

THE JOURNEY OF DEBUTANTS INTO THE BUSINESS ENVIRONMENT; REGISTRATION FACILITIES AND THE LEGAL FRAMEWORK OF THE AUTHORIZED NATURAL PERSON AND OF THE INDIVIDUAL ENTERPRISE

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Abstract

The theme of the present study regards mechanisms supporting the debutant business entities and the incentives for registering the economic activity, granted through incentive policies. We consider the statute of the debutant to be similar to that of the child. If the child can count for support and education on parents, grandparents and family in general, the business debutant is provided within the framework of economic policies with various incentives, tools and mechanisms of registration for purposes of carrying out economic activity. The horizon of the analysis covers the incentives granted at the launch of a business, especially if it is one of the primary types of enterprises, namely the authorized natural person and the individual enterprise. At the same time we will examine the judicial framework of economic activities carried on through the means proper to the primary types of enterprises, authorized and registered, namely: the procedure of registration and authorization with the trade registry, the patrimony of affectation and its effects, as well as other common rules and particularities of each type of enterprise, that outline their status as provided by the consolidated regulation that entered into force on 17 January 2017 – Law 182 of 2016 for approval of Government Emergency Ordinance no.44/2008.

Key Words: business debutant, incentives, economic activity, authorized natural person, individual enterprise, patrimony of affectation

JEL Classification: [K22]

Introduction

The present study¹ researches the judicial aspects with respect to the launch into the business environment of natural persons who start their first business, as well as that of students who carry on business under the primary types of authorized and registered enterprises, in accordance with legal provisions, which are the authorized natural person and the individual enterprise. Accordingly, we shall indicate the legal framework, respectively the general conditions and the special conditions to be met when initiating authorized and registered economic activity, as well as the incentives granted to the debutants in business.

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¹ Whose title paraphrases the title of the novel „Călătoria diletanților”, by Bulat Okudjava, Bucharest: Univers, 1983.

We consider the status of the business debutant to be similar to that of the child who is beginning the journey of life. Just as during childhood, the child has by its side the parents, grandparents and family, the business debutant is provided by the economic policies with incentives, levers and mechanisms for stimulation and support, that are mapped and developed in the present article.

The government gives the proper amount of importance to the debut moment of a business through its economic policies, in order to incentivize the initiation and carry on of a business by students, young people and not only. This aspect, in our opinion, needs to be complemented by counselling and information offered to the debutant through all stages of the business, because not only the “moment of glory” – the debut, but the entire activity must be carried on in the light of compliance with the legal requirements and obligations of social responsibility, which ensure the development of each entity and consequently the development of society.

The choice we made in favour of this theme was motivated also by the need for an undertaking that would bring to the attention of the entrepreneurs, precisely to those who start their first business, the legal rigors that must be complied with, including by debutants, in order to become an entrepreneur, in the context of the judicial regime that was recently consolidated through amendments and supplements brought by Law no. 182/2016 for the approval of the Government Emergency Ordinance no.44/2008 on economic activities by authorized natural persons, individual enterprises and family enterprises, law that entered into force on 17 January 2017.

1. The business debutant and the incentives for starting economic activity

The Government Emergency Ordinance no.44/2008 on economic activities carried on by authorized natural persons, individual enterprises and family enterprises², approved and amended through Law no.182/2016³, sets out the legal framework within which, provided that legal requirements for becoming entrepreneur are met, the natural person is entitled to choose the type of entity under which to carry on economic activity, whether it is individually – as authorized natural person (ANP), as individual enterprise (IE) or within a family enterprise (FE).⁴

Law no. 182/2016 for approval of GEO no. 44/2008 brings an *element of novelty* regarding the business debutants, by stipulating of the *conditions and incentives granted to students who set-up their own business as authorized natural persons (ANP) or as individual enterprises (IE)*.

²Published in the Official Gazette of Romania, Part I, no.328/25.04.2008, hereinafter called “GEO no.44/2008”.

³Published in the Official Gazette of Romania, Part I, no.828/19.10.2016, hereinafter called “Law no.182/2016”.

⁴In the present study we will use the acronyms - authorized natural person (ANP) - individual enterprise (IE), and family enterprise (FE).

As provided by art.35, para.1 of GEO no. 44/2008, introduced through art. I, pt.28 of Law no. 182/2016, the students who establish their own businesses may choose between two of the three types of companies, more exactly the authorized natural person (ANP) or individual enterprise (IE).

As the legal text mentioned above regulates expressly and cumulatively *the special conditions under which one can become an authorized natural person (ANP) or the holder of an individual enterprise (IE)*, as well the incentives granted to students who set-up their own business, we consider that students who wish to start a business *can choose to set-up a family enterprise, as type of entity, by means of which to initiate the business, but in this case they will not be able to benefit from incentives.*

Nevertheless, after examining the provisions of art.28 corroborated with art.29 of GEO no. 44/2008, we could ascertain that *the members of a family enterprise (FE) mai simultaneously hold the capacity of authorized natural person (ANP) or individual enterprise (IE)*, and the family enterprise (FE), through its representative, may collaborate with other authorized natural persons (ANP), holders of individual enterprises (IE), with representatives of family enterprises (FE) or other natural or legal persons, for the purpose of carrying on economic activity.

Consequently, a natural person who is a student and a debutant in business, as authorized natural person (ANP), individual enterprise (IE) or holder of a family enterprise (FE) may simultaneously be member of a family enterprise and may also collaborate with its representative for the purpose of carrying on economic activity.

It must be noticed that the relations referred to in art. 29, para. 3, *cannot influence nor change the legal framework of individual entrepreneurs* who are part of them. This resolution is grounded on art. 14, para. 1 of GEO no. 44/2008, which institutes the *principle of uniqueness of the registration certificate correlated with the legal framework*, according to which a person may hold only one registration certificate for the legal framework acquired as authorized natural person (ANP), holder of individual enterprise (IE) or member of a family enterprise (FE).

Similarly, in our opinion, a natural person who is a student can participate, as member, in the carrying out the economic activity within a family enterprise, in the meaning given by the law to the word "family", *without holding the capacity of business debutant at the same time*, therefore without benefitting from the incentives granted in this regard.

Art. 3, letter d) of the GEO no. 44/2008, approved through Law no. 182/2016, defines *family*, which according to the law comprises the husband, wife and their children above 16 of age at the date of authorization of the family enterprise, as well as the relatives up to the 4th degree.

For the reasons presented above, we consider that the student that begins a business can only benefit from legal incentives if he/she chooses one of the two types of entities, namely the authorized natural person (ANP) or individual

enterprise (IE), thus excluding the initiation of first business in the form of family enterprise (FE), this type not bringing any start-up support to the student as debutant in business.

In order to achieve the status of debutant individual entrepreneur authorized and registered as authorized natural person (ANP) or holder of individual enterprise (IE), benefiting from legal start-up incentives, the natural person being a student must fulfill both *the general legal requirements* in the matter, and the *special and cumulative requirements* established by art. 35¹, para. 1, of GEO no. 44/2008.

In what concerns the *general requirements and the particular requirements* for acquiring and exercising the capacity of individual entrepreneur carrying out economic activity under one of the regulated types of entities, provided by art. 8 of GEO no. 44/2008, *the natural person student, debutant in business must comply with these requirements during the entire time of the economic activity.*

As the requirements for acquiring the status of professional as individual entrepreneur in the economic activity are examined *in extenso* in section 2 of the study, we will present in this section the *special requirements and the cumulative requirements*, established by art.35¹, para.1, of GEO no. 44/2008 approved by Law no. 182/2016, applicable to the students who, by obtaining the capacity of authorized natural person (ANP) or holder of individual enterprise (IE) benefit of *exemption from paying the taxes charged for registration and authorization, as well as exemption from paying the fees for the services of counselling, which are provided by the trade registry offices.*

The special requirements and the cumulative requirements, stipulated by art.35¹, para.2, of GEO no. 44/2008 approved by Law no. 182/2016, refer to the requirements that the students as debutants in business must fulfill in order to benefit from the tax exemption applicable to registration and authorization, and to the fees for services of counselling provided by the trade registry offices: - the student must attend the classes of a higher education institution accredited in Romania; - the student must be at least in the second year of study and to have promoted, in full, at the request date, all the requirements of the curriculum provided by the senate of the institution; - the student must be under the age of 30.

The application for registration and authorization of the natural person (ANP) or individual enterprise (IE) must be accompanied by the supporting document issued by the higher education institution, attesting that the conditions stipulated by art. 35¹ letter. a) and b), are fulfilled, more exactly the one that regards the status of student in the second year of study of a higher education institution accredited in Romania, who promoted, in full, at the request date, all the requirements of the curriculum. The special, limitative condition concerns the age, which must be under 30, and the civil capacity, namely the full capacity of exercise, according to art. 8, letter a) of the ordinance, which can be proved through the identity card or passport, in copy certified by the holder for conformity with the original copy, as provided in the annex of GEO no. 44/2008, approved by Law no. 182/2016, pt.1/1.1, respectively pt. 2/2.1.

If the law-maker had a well grounded reason for granting incentives to business debutants who want to register under one of the primary typologies for carrying out authorized and registered economic activity in compliance with the law, namely the authorized natural person (ANP) and individual enterprise (IE), the actual effects of it were felt only for short term. This is because GEO no. 44/2008, approved by Law no. 182/2016 entered into force on 17 January 2017, while 1 February marked the entry into force of Law 1 of 2017 on the elimination of taxes and fees, as well as on the amendment and supplement of certain regulations⁵, which under pt.1 provides that no taxes or fees are charged for the registration and authorization with the trade registry, not even for registering and listing of new entries.

The declared aim of the legal act - Law no. 1/2017, is to eliminate certain taxes paid at the trade registry office, which can be beneficial for the business environment. In our view, the law indicated *ut supra* eliminates taxes corresponding to the operation of registration in the trade registry, *de plano*, irrespective of the typologies of the professionals or non-professionals who are subject to registration and irrespective of their character of debutants or non-debutants in the business environment.

To enhance their mobility, professionals, who must adapt to the market economy and therefore optimize their professional status in order to represent an offer that is customized in accordance with the demands of the market, often need to change their type of organization, their registered office, withstanding pecuniary consequences in the form of taxes charged for the listing of new entries in the trade registry. Therefore, in our opinion, the additional set of incentives, including the elimination of taxes charged for listing new entries regarding the status of professionals, are totally justified.

Hence we notice that on the background of the absence of a coherent legislative strategy, the incentives meant initially for debutants who want to register and authorize the economic activity under one of the primary typologies of legal entities, namely the authorized natural person (ANP) and individual enterprise (IE), are now generalized under the concept of *tax exemptions for operations of registration within the trade registry*, applicable to all categories of legal entities that have the obligation to be registered. From all the incentives provided by art. 35 of the GEO no. 44/2008 approved by Law no. 182/2016, for the students who acquire the capacity of authorized natural person (ANP) and individual enterprise (IE), apart from the tax exemptions for registration in the trade registry, measure that was incorporated in the tax elimination regulated through Law 1/2017, the only incentives applicable only to business debutants remain the exemption from paying the fees charged for the counselling services provided by the trade registry, which we consider to be insufficiently motivating to shift the interest of future entrepreneurs towards these types of entities.

⁵ Published in the Official Gazette no. 15 of 6 January 2017, hereinafter called "Law 1/2017".

2. The typologies regulated by GEO no. 44/2008, approved and amended through Law no. 182/2016; The legal requirements for acquiring the status

2.1 *The typologies regulated by GEO no. 44/2008, approved and amended through Law no. 182/2016;*

The typologies specific to the individual organization of the economic activity by the natural persons are provided in a limitative manner by GEO no. 44/2008 in its initial issue of 2008, which provides that natural persons can carry on economic activity as authorized natural persons (ANP) holders of individual enterprise (IE) or members of family enterprise (FE).

The legal act defines the three typologies in art. 2, letters g), h) and i), according to the updated definition following the approval of the ordinance through Law no. 182/2016. Hence, the *authorized natural person* (ANP) is the economic enterprise, without legal personality, organized by a natural person using mainly its workforce. *The individual enterprise* (IE) designates the economic enterprise, without legal personality, organized by an entrepreneur natural person. *The family enterprise* (FE) is the economic enterprise, without legal personality, organized by the member of the family.

In the meaning of art.3 letter a) of the above indicated legal act, consolidated version, *economic activity* refers to the activity carried on for profit purposes, such as producing, administrating or selling goods or "providing services", and the *economic enterprise* - by means of which the economic activity is carried on, is defined in art. 3 letter f) as being "economic activity performed in an organized, permanent and systematic manner, combining financial resources, labour force, raw material, logistical means and information, at the entrepreneur's risk, in the situations stipulated by the law".

2.2. *The legal requirements for acquiring the status of authorized natural person (ANP) and individual enterprise (IE); The procedure of authorization and registration in the trade registry*

In order to acquire, the legal capacity of individual entrepreneur under one of the three typologies provided in the ordinance, the individual must fulfil the requirements indicated in art. 8 of the GEO no. 44/2008⁶. Consequently, the natural person must: - have full capacity of exercise; exceptionally, the members of the family enterprise, who do not hold the capacity of representative, must be of at least 16 years of age;⁷ - have not committed acts sanctioned by fiscal,

⁶The legal requirements for carrying out economic activity in accordance with GEO 44/2008, as they were regulated before the entry into force of Law no. 182/2016 on 17 January 2017, to be seen in Stanciu D. Cârpenaru, *Tratat de drept comercial român*, Bucharest: Universul Juridic, 2016, pp. 50 and 51.

⁷ The aspect regarding the capacity of the natural person required in order to become a "professional trader" is developed in Stanciu D. Cârpenaru, *Tratat de drept comercial român*, Bucharest: Universul Juridic, 2016, pp. 55 and 56.

accounting, customs laws as well as laws on financial / tax discipline; - have a declared professional office; - declare on his sole responsibility that he/she fulfils the requirements for operating business, from sanitary, veterinary, environmental and labour safety point of view; - prove the fulfilment of the requirements on professional qualification or certification based on diploma, respectively the certificate attesting the professional training.

In the typologies regulated by the law in question, the capacity of individual entrepreneur is acquired by the natural person after *registration in the trade registry and authorization of legal functioning*, following the fulfillment of the requirements mentioned in art. 8, referred above, these being also *requirements for exercising the economic activity*.

The natural persons individual entrepreneurs have the obligation to apply for registration within the trade registry and for the operating permit, *before starting the economic activity*, provided as a legal obligation under art. 7 of GEO no. 44/2008 approved by Law no. 182/2016, corroborated with art. 1, para. 1 of Law no. 26/1990 on trade registry.⁸

If the legal requirements are fulfilled, following the application for registration and authorization lodged by the applicant, together with the documented evidence, the director of the trade registry office attached to the county court or the person designated by the director through a decision, approves the registration within the trade registry. If the evidence is incomplete, the director of the trade registry office attached to the county court grants 15 days for their completion, term that can be prorogued at the motivated request of the applicant, one time, by maximum 15 days. In case the legal obligations are not fulfilled after this additional term, the director of the trade registry office or the designated person orders by means of *motivated resolution* the dismissal of the application for registration and authorization, in accordance with art. 10 of GEO no. 44/2008 approved by Law no. 182/2016.

Within 15 days from its issue or communication, the applicant may file complaint against the director's resolution, to the district court having jurisdiction at the applicant's professional office.

The applications submitted to the district courts with respect to the enforcement of the provisions of GEO no. 44/2008 approved through Law no. 182/2016, are *exempted from the stamp duty*, as provided by art. 12, para. 3 of the law. This measure creates the possibility of free access to justice for the individual entrepreneurs.

⁸Published in the Official Gazette no. 113 of 16 October 1990, hereinafter called "Law no. 21/1990". In the case of family enterprise, the indicated legal text institutes the obligation of the representative to submit application in this respect, but if the representative does not submit the application within 15 days from the conclusion of the agreement establishing the enterprise, any member of the family enterprise may request the registration in the trade registry and the authorization of activity. In all cases, the application for registration within the trade registry and the authorization of the activity must be submitted within 20 days from the conclusion of the articles of incorporation.

In our opinion, the procedure of registration and authorization of professionals – individual entrepreneurs is hence aligned to the procedure of registration and authorization of professionals – legal persons, carried on at the trade registry office for all professionals who carry on economic activity consistently, irrespective of the type of organization – individual (authorized natural persons, individual enterprises, family enterprises) or collective (legal persons). Moreover, this aspect is highlighted in the motivation of Law 182/2016, which explains the need for harmonization of the procedure on authorization of individual entrepreneurs, for a unitary and timely interpretation and implementation of the regulation in the matter.⁹

3. The patrimony of affectation of the natural persons who carry on authorized economic activity

GEO no. 44/2008 regulates the legal framework for the organization, authorization, registration and functioning of professionals natural persons entrepreneurs, and provides the possibility for them to set-up the patrimony of affectation as "patrimony mass" within the patrimony whose holder is the natural person, patrimony that is engaged for the legal liability of these professionals regarding the obligations undertaken in exercising the profession.

In the meaning of art. 31, para. 1 of the Civil Code, the patrimony is composed of all the rights and obligations that can be assessed financially and which belong to the holder who may be either a natural persons or a legal person. If the text of art. 31, para. 1 provides the *principle of uniqueness of the patrimony*, the same article brings an element of novelty in para. 2, *the formal, explicit stipulation of the possibility of the holder of patrimony to constitute the separation or affectation of patrimony into patrimony masses*, including the ones dedicated to the exercise of a profession, without interfering with the uniqueness and unity of the patrimony. The patrimonies of affectation are the fiduciary masses, the ones dedicated to the exercise of an authorized profession, as well as other masses as determined by the law.

The legal provision of art. 32 of the Civil Code according to which in case of *intrapatrimonial transfer*, the transfer of rights and obligations from a patrimonial mass to another – within the same patrimony - does not represent a sale, accentuates the unity feature of the personal patrimony.¹⁰

⁹Conclusions on the favorable aspect resulted from establishing the judicial regime of persons who carry on authorized economic activity within the framework instituted by GEO no. 44/2008, by comparison to the previous regime of authorization according to which registration and authorization was under the competence of local entities, see Cristea, S. *Regimul juridic al persoanelor fizice autorizate*, Monitorul Fiscalității Internaționale, no. 6/2010.

¹⁰For comments on the Civil Code articles indicated above, see Baias, F., Chelaru E., Constantinescu R., Macovei I., 2012, *Noul cod civil. Comentariu pe articole*, Bucharest: C. H. Beck, p.34-39, p. 2272-2275. Aspects regarding the compatibility of the regulations comprised in GEO 44/2008 with those of the Civil Code, entered into force in 2011, see Lipcanu, E., *Aspecte privind regimul juridic al întreprinderilor individuale și familiale reglementate prin Ordonanța de Urgență a Guvernului nr.*

Since the legal liability of the natural person who carries out authorized economic activity is *unlimited liability* for the obligations undertaken in the exercise of the profession, the constitution of the patrimony of affectation does not have as consequence the elimination of the possibility of attaching the legal liability with the entire personal patrimony, and the personal liability may be attached alternatively for that part of the natural person's patrimony that is not included in the patrimony of affectation, if the professional creditor was not indemnified from the assets included in the patrimony of affectation. The doctrine develops the theory of "segregation of the creditors of professionals"¹¹ explained to be operating as "separation of those with debts arising from professional activity from the personal debts, thus establishing an order of preference that ensures the management of risk."¹²

Segregation consists in that professional creditors will be separated from personal creditors, and for personal creditors will be instituted the interdiction to pursue the patrimony affected to the economic activity, subsumed to the legally constituted patrimony of affectation.

The patrimony of affectation, in the meaning of art. 2, letter j) of GEO no. 44/2008 approved by Law no. 182/2016 is the "patrimonial mass within the entrepreneur's patrimony, representing all the rights and obligations affected to the exercising of an economic activity, through written statement or, if applicable, through the agreement of constitution or through an additional act"¹³

In the wording used previously to the adoption of ordinance, the patrimony of affectation used to represent "all the assets, rights and obligation affected for the purpose of exercising an economic activity, constituted as distinct fraction of the patrimony of the person separated from the general collateral of the personal creditors"¹⁴.

By comparing the two definitions given to this concept it can be determined on the one hand a better defined configuration of the means of

44/2008 în lumina noului Cod Civil și a Legii nr. 71/2011 și succinte aprecieri în legătură cu demersul de reformare a dreptului privat. Revista Dreptul, no. 11/2011, pp.52-61.

¹¹ In Piperea, G., 2012, *Drept comercial. Întreprinderea*, Bucharest: C.H. Beck, pp.60-63 and Catană R., 2013, *Drept comercial in Powerpoint*, Bucharest: Universul Juridic, p.98.

¹² Catană R., 2013, *Drept comercial in Powerpoint*, Bucharest: Universul Juridic, p.98, case-law and doctrine cited therein.

¹³ Details on the concept of "patrimony of affectation" see in Stoica, V., *Patrimoniul de afectatiune – continuitate și reformă*, Revista Română de Drept Privat, no. 2/2013 as well as in Rizoiu, R., *Garanția comună a creditorilor în Noul Cod Civil*, Revista Română de Drept Privat, no. 1/2012.

¹⁴ See in Lefter, C., *Reglementarea desfășurării activităților economice de către persoanele fizice autorizate, întreprinderile individuale și întreprinderile familiale în baza Ordonanței de urgență nr. 44/2008 - între noutate și controversă*, Revista Română de Drept Privat nr.1/2009, the critiques brought to the regulation issued in the field of affectation patrimony, by relation to provisions of art. 2.324, para. 3 of the Civil Code, and the effects of setting-up this patrimony, namely the segregation of creditors, which did not determine „increase of legal protection” (of the professional creditors), as the „little” entrepreneur is still deprived of a legal regime that would favor of at least support the development of this category of operators, on the Romanian market as well as on a larger scale on the internal community market.”

constituting the patrimony of affectation – in the current definition, and on the other hand, a simplification of the definition, by concentrating the features of the patrimony of affectation as patrimonial mass affected to the economic activity, constituted by rights and obligations, in accordance with the definition attributed by the common law regulation to the patrimony and its divisions.¹⁵

In establishing liability for the obligations undertaken while running the economic enterprise, in the case of authorized natural persons (ANP) and individual enterprises (IE), GEO no. 44/2008, approved by Law no. 182/2016, in art. I, pt. 19 and pt. 22, makes reference to the subsidiary character of liability covered with "the other assets of the debtor", mentioning the enforcement of provisions under art. 31, 32 and 2.324, para. 3 of the Civil Code.

The patrimony of affectation that the entrepreneur natural person can set-up, in accordance with GEO no. 44/2008, approved by Law no. 182/2016, is identified, from the content point of view, through the articles of incorporation established by the holder, and comprises the *rights and obligations* that make –up this *patrimonial mass*, and consequently the *intangible elements*.

But as the doctrine¹⁶ stated, the patrimony of affectation includes not only the affected assets, but also the assets acquired during the activity carried on, and the aspects of enforceability and publicity, that were considered, by the same doctrine, to have remained unresolved by GEO 44/2008 and by the law of approval, we ascertain that *it ca be resolved by applying the following rule: the entrepreneur sets-up the patrimony of affectation, by fulfilling the legal and professional obligation to request the registration of mentions in the trade registry, according to art. 21 of Law no. 26/1990, concerning the acts that require to be registered or the ones that amend the entries already registered.*

If the entrepreneur natural person is to set-up the patrimony of affectation at the moment when he/she acquires the professional status, the registration of this patrimony as well as the effects of publicity and enforceability shall be carried on at the moment of registration of the entrepreneur in the trade registry.

If we cast a comparative look over the compatibility of the regulations on patrimony, on the one hand, and on the patrimony of affectation on the other hand, the latter one, observed in the light of both the common law regulation and the special regulation under GEO 44/2008 approved by Law 182/2016, we may raise the issue of content configuration of the patrimony of affectation of the professional natural person entrepreneur. Moreover, this approach requires correlation also with the issue of the stock-in-trade whose holder is the professional of the economic activity.

As we have shown previously, the patrimony of affectation that can be set-up by the entrepreneur natural person is a *patrimonial mass*, as *fraction or division of the legal universality representing the patrimony of this natural person*, that *comprises the rights and obligations of the holder, affected to the exercising*

¹⁵The patrimony and its divisions make the object of provisions of art.31-art.33 of the Civil Code.

¹⁶Piperea, G., 2012, *Drept comercial. Întreprinderea*, Bucharest: C.H. Beck, pp.60-63.

of the authorized economic activity, such as it is identified through the unilateral act or, if applicable, through the agreement of constitution of the family enterprise or through an additional act to it. Consequently, the patrimony of affectation is part of the legal universality, having as holder the entrepreneur natural person, and consequently it comprises *intangible elements, in the meaning of the law, and not the goods in the material meaning*.

We consider that the assets, in the material meaning, used by the entrepreneur natural person, in exercising the authorized economic activity, are part of the entrepreneur's stock-and-trade, since according to the law, they cannot be included in the patrimony of affectation which is a patrimonial mass comprising intangible assets (rights and obligations).

Consequently, the *stock-in-trade* is defined by the theory of commercial law¹⁷ as a universality *de facto*, of tangible and intangible elements (such as rights regarding the name, the logo, the clients, the registered marks, the copyrights, know-how, etc.), and we consider that the concept requires an update and even a new definition, if we go by the thesis according to which the stock-in-trade has not lost its purpose and usefulness, in the meaning that the *stock-in-trade* represents a universality *de facto*, created by the will of its holder and it is comprised only of tangible elements, which are goods that serve the holder in exercising the authorized economic activity.¹⁸

We consider this approach of the notion *stock-in-trade* to be in compliance with the legal definition of the notion of universality *de facto* which, according to art. 541 of the Civil Code, republished in 2011, represents the sum of assets belonging to the same person and having a common purpose established by the will of that person or by the law, assets that separately or as a whole can make the object of distinct judicial acts or relations.

The legal text indicated above expresses, in final thesis, in an explicit manner, the possibility for these tangible (material) assets to make the object of rights resulting from distinct juridical acts or relations. One such case could be that where the material assets are affected by a professional entrepreneur, natural person, to exercising the authorized economic activity, and this way, this mass of tangible assets is part of the entrepreneur's stock-in-trade, while the rights – as intangible elements – constituted over these assets make up the entrepreneur's patrimony of affectation.

In the opinion of the doctrine, "the theory of the patrimony of affectation defines the institution in the most adequate manner, in the case of the commercial

¹⁷In this regard see Turcu, I., 1998, *Teoria și practica dreptului comercial roman*. vol. II, Bucharest: Lumina Lex, pp.14-15, doctrine and case-law cited therein and in St. Carpenaru, 1998, *Drept comercial*, edition II revised and supplemented, Bucharest: AAL Educational, p.106 and doctrine cited therein, pp. 94-96 and doctrine cited therein.

¹⁸For the distinction between the legal universality and the *de facto* universality, as well as for the concept of patrimony as legal universality, in the context of the regulation by the Civil Code republished in 2011, see Țândăreanu, N., *Conceptia noului cod civil cu privire la patrimoniul*, available at http://www.inm-lex.ro/fisiere/d_1214/Patrimoniu.pdf, accessed 15.03.2017.

creditors of the entrepreneurs natural persons who set-up affectation patrimonies, and the theory of the intangible assets right defines the stock-in-trade, for the natural persons who did not set-up affectation patrimony (the legal norms regulating the affectation patrimony, according to GEO 44/2008 are not mandatory). In the situation where, according to the ordinance, it is possible to have a stock-in-trade without setting-up the affectation patrimony, the legal nature of such stock-in-trade, can only be that of intangible assets, according to our opinion. If the entrepreneur natural or legal person sets-up an affectation patrimony, under the conditions established by the law, the legal nature of the stock-in-trade is that of affectation patrimony.”¹⁹

We consider that, in view of the legislative framework presented above, *the notion of affectation patrimony* – as part of the legal universality affected to exercising professional activity, made-up of intangible elements (rights), on the one hand, and the *stock-in-trade* – as universality de facto, which incorporates tangible elements (assets) of the professional entrepreneur natural person, on the other hand, overlap the notion of patrimony, whose sole holder is the natural person.²⁰

4. Special rules and particularities on the legal framework of the authorized natural person (ANP) and individual enterprise (IE)

4.1. Rules on the legal framework of the authorized natural person (ANP) and individual enterprise (IE)

(i). The act of initiating the registration and authorization of the natural person as holder of the authorized natural person (ANP) or, if applicable, holder of individual enterprise (IE) is undoubtedly the act of the natural person.

(ii). *Acquiring the capacity of professional and the applicability of the insolvency proceedings*: the entrepreneur natural person acquires the capacity of professional after the registration in the trade registry – art. 20, art. 23; any interested person can make proof of the capacity of professional within the insolvency proceedings provided by Law no. 85/2014, or separately, by declaratory action, if it justifies a legitimate interest – art. 20, para. 3.²¹

¹⁹ Herovanu, L.V. 2011, *Fondul de comerț*, Bucharest: Universul Juridic, p.119 and doctrine cited therein.

²⁰ An analysis on the delimitation of the concept of „stock-in-trade” in correlation with the concept of „patrimony of affectation” of the natural person entrepreneur, and the opinions expressed in the doctrine on this subject, see in Smarandache, L.E., *Aspecte privind fondul de comerț al comerciantului persoană fizică*, Revista Pandectele Române, nr.1/2011.

²¹ The conditions for opening the bankruptcy proceedings of the natural persons, who carried on non-authorized and non-registered economic activity under the legal regime of Law 85/2006 on insolvency see Motu, F., *Falimentul comerciantului persoană fizică neautorizată/neînregistrată în Registrul Comerțului. Condiții de admisibilitate*, Revista Pandectele Române, nr.12/2011. In the current regulation comprised in Law 85/2014 on the prevention of insolvency and insolvency, it is expressly provided in art.38, para.2, letter f), that the simplified proceedings provided in the present article is applicable to debtors undergoing insolvency, who fall under one of the following categories: a) professionals natural persons subject to the obligation of registration within the trade registry, except

(iii) *Representation and decisions concerning the current activity*: representation shall be assured and the decisions shall be taken by the natural person entrepreneur.

(iv) *The requirements on the object of activity*: the natural person holder of an authorized natural person (ANP) and respectively, the holder of the individual enterprise (IE) may have as objects of activity maximum 5 classes of activities provided by the CAEN code: in the case of the authorized natural person (ANP), this may have as objects of activity maximum 5 classes of activities (art. 16), respectively the individual enterprise (IE) may have as objects of activity maximum 10 classes of activities provided by the CAEN code (art. 24), in this regard having to request, based on the application submitted at the trade registry office, the registration of mentions concerning the object of activity followed by the issue of the new certificates of registration, free of charge.²²

(v) *Professional office*: is registered at the trade registry office, and if the professional office is moved to another county, the director of the trade registry office or the designated person with which the authorized natural person (ANP) or the individual enterprise (IE) is registered, shall approve – through the same resolution – the change of professional office to another county, registration in the trade registry from the county of the new office and the removal of registration from the trade registry in the county of former office, ordering the registrations in the trade registry – art. 14, para. 2.²³

(vi) *Contractual relations with other authorized natural persons / other legal persons*: the natural person entrepreneur may establish contractual relations with any natural and legal persons, with other authorized natural persons (ANP), individual enterprises (IE) and family enterprises (FE), with the purpose of carrying on economic activity, without changing the legal status – art. 16, art. 24, art. 29.

for the persons who exercise liberal professions; b) family enterprises, members of the family enterprise; f) any person who carries out activities specific to professionals, and who has not obtained the authorization provided by the law for operating an enterprise, and is not registered in the special registries for publicity; the enforcement of the present law in relation to these persons does not exclude the sanctions applicable to the absence of authorization or registration of that person. In respect of these aspects see Tabacu, A., *Persoana fizică autorizată, întreprinderea individuală și întreprinderea familială. Debitori în procedura insolvenței. Sensul noțiunii de "patrimoniu al debitorului"*, Revista Română de Jurisprudență nr. 1/2015.

²²In accordance with art. II of Law no. 182/2016: „within 2 years from the entry into force of the law, the authorized natural persons and individual enterprises whose number of activities included in the objects of activity is higher than the number provided by the law, shall request for the corresponding modification to be operated on the mentions entered in the trade registry, regarding the object of activity”.

²³The observation of the doctrine regarding the fact that GEO no. 44/2008 does not comprise the obligation of the entrepreneur to mention on the invoices, addresses or offers, the name, registered office, and tax code, is of high interest even if legally it wasn't backed-up even after the approval of GEO no. 44/2008 through Law no. 182/2016, see in Smarandache, L.E., *Comerciantul persoană fizică. Aspecte esențiale privind: dovada calității și atribuțiile de identificare obligatorii (I)*, Revista Pandectele Române, nr. 5/2011.

(vii) *Cumulation of the activity* carried on under the specific typology with the capacity of employee of a third party: natural person entrepreneur may cumulate the two capacities even if the third party operates in the same domain or in a different one than authorized - art.17, art.25 and art.28.

(viii) *Insurance in the public social system of pensions, unemployment and health insurance*: natural person entrepreneur is insured in the public system of social insurance (pensions) and unemployment; the persons have the right to be insured in the system of health insurance - art.18, art.25.

(ix) *Rules on accounting and taxation*: the natural person entrepreneur has the obligation to use the single-method of bookkeeping and has the capacity of income taxpayer -art.15 and art.38.

4.2. Particularities of the legal framework of the authorized natural persons (ANP) and of the individual enterprise (IE)

We consider that the presentation of the particular aspects, in a schematic representation, is the best way to highlight those features that determine the specific character of each of the two typologies analyzed in this study.

Particular rules	<i>Authorized natural person (ANP)</i>	<i>Individual enterprise (IE)</i>
Cumulating the capacities of several typologies of carrying out economic activity regulated by GEO no. 44/2008;	Cannot cumulate the capacity with that of entrepreneur holder of an individual enterprise (II) (art. 19 para. 2); can be member of a family enterprise (FE);	Can also be member of a family enterprise (FE) (art. 28 para. 2);
Possibility of hiring, as employer, third parties, with individual employment contract;	Can hire, as employer, maximum 3 persons with individual employment contract (art. 17);	Can hire, as employer, maximum 8 persons with individual employment contract (art. 24);
Continuation of activity by the heirs, in case of termination of activity or death of the natural persons;	Not possible because following the death of the holder, ANP terminates activity and is removed from the trade registry (art. 21);	It is possible; the activity may be continued under the same enterprise, after mentioning the capacity of heir; if there are several heirs, they will continue the activity as family enterprise (art. 27).

Changing the acquired legal status;	Can request the change and authorization as entrepreneur, holder of an individual enterprise (IE) (art. 19, para. 2.)	-
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5. Conclusions

GEO no. 44/2008 approved through Law no. 182/2016, features in the current version an extension of the content, with elements of novelty which target mainly at stipulating the requirements and incentives granted to students who start their own business, the types of entity under which these debutants in business can register and operate in an authorized and registered manner. The act also reviews the requirements concerning the three types of organisations under which entrepreneurs natural persons carry on economic activity.

In relation to the means in which the patrimony of affectation is regulated, in the case of primary typologies used for carrying on authorized economic activity, we consider that since they are attached with unlimited liability for the professional obligations, these typologies are used to a continuously lesser degree. The legal system of the GEO 44/2008 approved through Law 182/2016 also maintains the liability of the natural person entrepreneur for the professional obligations, with the entire personal patrimony, even if it is attached only alternatively and on that part of the natural person's patrimony that is not included in the patrimony of affectation, if the latter was set-up. At the same time, we find as being up-to-date and highly applicable in practice the observations of the doctrine²⁴ with regard to the appeal against enforcement as means of invoking the alternative character of the liability of the natural person entrepreneur with his/her entire patrimony, hence also with the part that is not included in the patrimony of affectation.

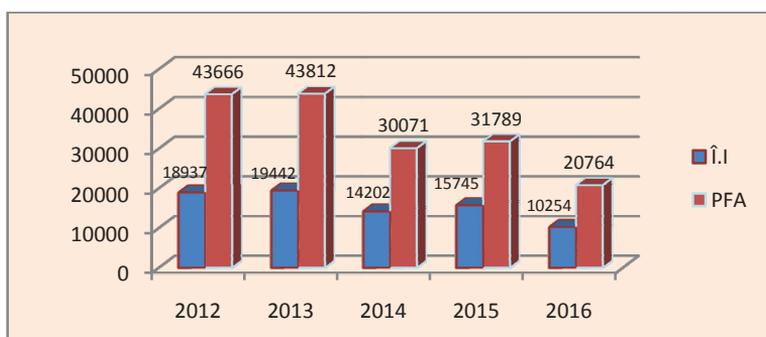


Figure 1. Number of ANPs and IE registered at the NOTR between 2012 and 2016

Source: <http://www.onrc.ro/index.php/ro/statistici>

²⁴Piperea, G., *Diviziunile patrimoniale și confuzia de patrimonii – noi motive de contestație la executare*, Curierul Judiciar no.9/2012.

In the above analysis we could determine that if in 2012 the number of authorized natural persons (ANP) registered in the trade registry was of 43.666, in 2016 there were registered only a number of 20.764 ANPs. Similarly, if in 2012 there were 18.937 newly registered individual enterprises (IE), in 2016 the registrations decreased to just 10.254 IEs.

The analysis reveals the declining character of the number of authorized natural persons (ANP) and individual enterprises (IE) registered in the trade registry between 2012 and 2016, the number of authorized natural persons (ANP) dropping almost with a half, and the number of newly registered individual enterprises (IE) decreased by 44%. During the entire analyzed period, the number of registered authorized natural persons (ANP) was almost double to the number of individual enterprises (IE)

We conclude that since 2008 - the time of the initial regulation, the primary typologies under which the natural person carried on economic activity had the tendency to settle down in the matrix of a clear, coherent framework, effectively correlated with other legal regulations, however, the regulatory clarifications on the segments patrimony and liability, were kept pending for too long, and in our opinion they induced the diluting of the perception and use of these primary typologies, as the "better times are the times that are to come but one cannot tell why they never reach us"²⁵.

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²⁵Okudjava, B., 1983, *Călătoria diletanților*, Bucharest: Univers.

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