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DOING BUSINESS IN ROMANIA*

Theoretical
article

PERSPECTIVES ON THE TYPES OF DOING BUSINESS. TYPES OF INDIVIDUAL AND COMPANY ENTITIES WITHOUT LEGAL PERSONALITY. TYPES OF ENTITIES WITH LEGAL PERSONALITY

Keywords

Categories of entities
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Abstract

The analysis in the present study integrates the types of trading entities in order to clearly determine them. A first reference theme when setting-up a business is that of the legal personality it would take. The new Civil Code, acting as common law in the field of trading entities, determines the realignment and balancing of the regulations on types of business.

Company Law 31 of 1990 preserves the types of trading entities with legal personality regulated here: general partnership, limited partnership, limited partnership by shares, limited liability company, joint-stock company.

The simple partnership which can gain legal personality is widely regulated, and for the partnership are mainly preserved the landmarks drawn by the Commercial Code of 1886 that is presently repealed.

In conclusion, the present study analyses and answers the question – who are the legal trading entities and what are the regulated types of business.

**The present article is part of the research project "Guide to the legal regime of foreign investments in Romania – Doing business in Romania" that is carried out during the university year 2014-2015 within the "Dimitrie Cantemir" Christian University of Bucharest, Faculty of Law Cluj Napoca. The first 3 articles analyse in the introductory part the extent of the liability of the entrepreneur, partner, shareholder for the professional obligations of the types of trading entities.*

In order to maintain the coherence of the study, the first three articles, which approach a unitary theme, were published in the same number of the review, being given the following titles: 1. Perspectives on the types of doing business. Types of individual and company entities without legal personality. Types of entities with legal personality; 2. The paradigm of the (un)limited liability of the entrepreneur for the professional obligations of the types of entities without legal personality; 3. The paradigm of the (un)limited liability of the partner for the professional obligations of the company with legal personality

Also in this introductory part, we are to approach in a series of articles the pathological aspects of the legal personality of the trading entity, the theory of the piercing of the corporate veil,

The project comprises a general part with the following components: 1. The general regulation framework of foreign investments; the state's intervention in the economy; the governmental strategy on foreign investments having in view the protection, guarantees and amenities granted to foreign investors. Univ. Lecturer PhD. Corina Cristina Buzdugan; 2. Promoting the foreign investments from the point of view of public – private partnership. Assoc. Prof. PhD Mihaela Elena Fodor 3. Setting-up, organizing and functioning of the companies with foreign investors. Types and formalities for set-up. Assoc. Prof. PhD Rodica Diana Apan, as well a special part covering aspects of taxation and competition relevant to the foreign investments in Romania.

The studies that shall be reunited within the project use the following methodology: present fundamentals of the national doctrine in the field and the position of case-law, and structured in this manner they aim to represent an authentic guide for those who provide legal, managerial and financial-fiscal advice for the business environment, as well as for the investors.

“On the ground of the practical purpose of the studies carried out within the project, we have chosen to publish in an environment where the information they contain can be disseminated by those for whom it is meant. The Romanian Academy, The Romanian Foundation for Business

Intelligence (FRIA) the editor of the publication "Cros-Cultural Management Journal" and associated journals "SEA-Practical Application of Science & Network Intelligence Studies", organizer of Conference "Network Intelligence", which is going to take place in Romania, Iasi, at the Romanian Academy, Iasi Branch, between the 28th and 29th of November 2014, by being a part of this series of events organized by the FRIA, constitute such an environment and we thank the editors for this opportunity.

The stage of civil entity entrepreneurs – types of physical entity entrepreneurs

This stage comprises the types of physical entity entrepreneurs that are authorised to carry out economic activity pursuant to art.4 of GEO 44/2008:

a) the sole trader may carry out any economic activity regulated by the law, using mainly its own workforce;

b) the natural person holder of an individual enterprise is the economic enterprise with no legal personality, and the entrepreneur is the natural person that runs this enterprise; the economic enterprise carries out organized, systematic and permanent activity by combining workforce, raw materials, logistic and informational resources at the entrepreneur's risk.

c) the natural person member of a family enterprise, carrying out economic activity, without legal personality, managed by a natural person entrepreneur together with his family (R doi, 2010);

The stage of legal entity entrepreneurs – types of companies / partnerships with or without legal personality

This stage comprises types of companies/partnerships with or without legal personality.

The stage of legal entity entrepreneurs – types of companies / partnerships with legal personality

Relating to the criterion of types ("form" according to the Civil Code) the enterprises are classified by art.1888 of the Civil Code as follows:

“Art. 1.888. –the type of enterprises may be:

- a) simple partnership;
- b) partnership;
- c) general partnership;
- d) limited partnership;
- e) limited liability company;
- f) joint stock company;
- g) joint stock partnership;
- h) cooperative company;
- i) other type of company under the law. »

According to the order laid down by art.1888 of the Civil Code, we will begin our analysis with para.(1) (a) (b) of this article which

contains the following types of entrepreneurs without legal personality.

a) *simple partnership*;

b) *partnership*;

Preceded as type, *illo tempore*, by the "civil society" as regulated by the old Civil Code (on civil society see Carpenaru, 2012, p. 118-119), the new type of entity – the simple partnership, is expressly regulated by art.1890-1948 of the Civil Code (see the administration of the simple partnership in full in Gheorghe, 2013,p.5-170)

According to the provisions of art.1892 (1) of the Civil Code the simple partnership does not have legal personality, but art.1892 (2) (3) of the Civil Code provides that legal personality can be gained through the will of the associates who shall establish through an addendum to the memorandum of association, without disposing the winding-up of the simple partnership, the type of company with legal personality they are to constitute while following the judicial dispositions applicable in the matter. The legal contractual nature of the simple partnership is settled by the doctrine (Piperea, 2012, p.313) in that the type of trading entity with legal personality that it constitutes, with the observance of the legal provisions applicable to it. The contractual legal nature of the simple partnership is established by the doctrine (Piperea, 2012, p.313), which mentions that apparently it "is opposable to the institution".

Regarding the partnership art.1951 (1) of the Civil Code provides that "*the partnership cannot acquire legal personality and shall not represent a person separate from the person of the associates in their relation to third parties.*"

In accordance with the provisions of art.1949 of the Civil Code, the partnership is defined as being "*the contract of partnership is the contract by which a person gives another person or several persons a participation in the benefits and loss resulted from one or several operations carried out.*" This matter is regulated by the art.1949-1954 of the Civil Code while previously comprised in art.251-256 of the 1868 Commercial Code that is presently repealed. The partnership falls also under the regulations of the Civil Code similarly to the previous regulation by the Commercial Code, through the elements provided in art.1951: shall not represent a person separate from the person of the associates in their relation to third parties; cannot acquire legal personality; shall not have any right towards the association and shall have obligations only to the associate it concluded a contract with;

Hence, compared to the simple partnership, the partnership does not have and cannot acquire legal personality, fact which deprives the partnership of the registration in the trade registry, consequently the conclusion of the

partnership contract shall not be enforceable against third parties, thus generating the occult nature of the partnership.

The obligation to registrate the partnership at the fiscal entity, to declare and pay the taxes on incomes resulted from the partnership, under the terms laid down by the Fiscal code, art.28, and art.127, para.9 and 10 attenuates the occult nature of the partnership, (see the fiscal rules applicable to partnership in Marinescu, 2011, p.47 and the following) considering that *illo tempore*, this aspect used to be one of the main point of interest when choosing this type of partnership (see the advantages and disadvantages of partnership in Marinescu, Comanescu, 2011, p.51-52).

Art. 127 of the Code of Fiscal procedure stipulates that:

„(8) *Under the conditions and lilitations provided by the law, It is considered as unique fiscal group a group of taxable persons established in Romania who, being independent from legal standpoint, maintain close mutual relations from the organizational, financial and economical standpoint, and who are administered by the same fiscal authority.*

(9) *Any associate or partner in a partnership or organization without legal personality is considered to be a taxable person separately for those economic activities that are not carried out on behalf of the respective partnership or organization.*

(10) *The partnerships do not represent a separate taxable person. Joint venture, consortium and other forms of partnerships for trading purposes, which do not have legal personality and are legally set up, are treated as partnerships."*

Corelating the aspect indicated *ut supra* with the observations of the doctrine (see Sauleanu, 2011, p.130) regarding the lengthy regulation of the simple partnership compared to the scant regulation of the partnership offered by the Civil Code, as well as the fact that both can be used by professionals and non-professionals, a thing which attracts the risk of confusing them, even more so from of the way we classified them in the present study it results that they are both types of entity without legal personality, hence, the forecast on the reduced future use of partnerships are justified.

Under the aspect of the term used, the Civil Code introduces the synonymy between the terms "company" and "partnership", as seen in articles 1888 and 1949. While representing a divergence from the traditional term used for "the partnership contract", in our opinion, this synonymy brings more confusion than new meanings. Although the Civil Code names it "partnership (company)" it doesn't fully match the characteristics of a company, as it aligns more with the Civil Code regulation for the simple partnership which does have contractual nature but doesn't

have legal personality, however the simple partnership can gain legal personality.

The nature of the partnership is contractual, as the doctrine reveals "the partnership does not tend to outgrow the contractual stage in order to become a structure of its own" (Sauleanu, 2012, p.39-40). However, art. 1949 of the civil Code, similarly to the old regulation, does not mention the partnership of two or more persons for a common goal, as it makes reference to "*a person giving another person or several persons a participation in the benefits and the loss resulted from one or several operations carried out*".

Therefore the partnership (the partners are not defined in the Civil Code; the doctrine names them "main partner/participant partner in Marinescu & Comanescu, 2011, p.51-52 or „representing partner/ silent partner in Baias *et al* 2012, p.1972 and in Piperea, 2012, p.362-363; "active/visible partner/passive partner" in Catana, 2013, p.50-52; «managing partner/ participant partner» in Sauleanu, 2012, p.47-48) is focused on that person that will be visible, well-known in relation with the third parties and that will manage the partnership, an aspect that accentuates the obscure nature of the partnership (for the obscure nature of the partnership see Sauleanu, 2012, p.40-41; Piperea, *Commercial Law. The enterprise*, 2012, p.362-363 ; Catana, 2013, Bucharest, p.50-52).

Therefore, in the stage of the trading entity with legal personality, in accordance with art.1888, (1), a) and b) of the Civil Code professionals can form the following types of entities without legal personality: simple partnership / partnership.

This stage which comprises partnership types without legal personality represents a hybrid stage, intermediary between the stage of the physical entity companies and the legal entity companies, and at the same time this stage is the predecessor of the types of companies having legal personality. There is also some interference, provided by the law, between the types of trading entities with legal personality and those without legal personality.

Between the simple partnership (without legal personality) and the companies with legal personality set-up according to the Civil Code, art.1889, (1-3) there is the following interference:

-in accordance with the provisions of art.1892 of the Civil Code (2) (3) the simple partnership can gain legal personality by the partners' will, who shall establish through a addendum to the company contract, without ruling the winding-up the simple partnership, the type of trading entity with legal personality being set-up with the observance of the legal provisions applicable to it, hence the the trading entity without legal personality can transcend towards the trading entity with legal personality in the conditions indicated above.

The partners' and the newly set up entity's liability for the debts arisen before acquiring legal personality is joint and impartible in the case of setting-up a trading entity with legal personality resulting from the amendment of the memorandum of the simple partnership.

We notice that with regard to the partnership, the interdiction established by art. 1951 of the Civil Code is very clear, hence this type of trading entity cannot transcend to a type of trading entity with legal personality.

For the types of trading entities with legal personality that are going through different stages of the process of acquiring legal personality, for some expressly determined cases, generally between the conclusion of the articles of association and the moment when the legal personality is acquired, the applicability lies in that the companies that applied for registration but did not obtain it as well as the registered companies are absorbed by the simple partnership, pursuant to art.1983 of the Civil Code. The trading entities regulated by Law 31/1990 are part of those which must be registered, therefore in the case where they remain unregistered, the rules of the simple

The stage of the trading entities having legal personality

This stage comprises types of trading entities with legal personality as provided by art.1881 (3) "the company may be set-up with or without legal personality". Art.1889 (1) of the Civil Code stipulates that through the company contract or through a separate contract the partners may agree to the set-up of a trading entity with legal personality under the conditions laid down by the law." In this case their liability for the social obligations is subsidiary, unlimited and joint where the law does not provide otherwise.

And if "in accordance with the partners' will, the trading entity is to have legal personality irrespective of the object of activity" art.1889 (2) (3) of the Civil Code expressly stipulate that "*it can be set-up only in the type and conditions provided by the special law which grants its legal personality. The trading entity acquires legal personality on the date of its registration in the trade registry, unless the law provides otherwise.*"

One of the "special laws" that grants legal personality to a trading entity is Law 31/1990, by stipulating the type and conditions that must be fulfilled in order to acquire legal personality and to be registered in the trade registry.

In the order indicated by art.1888 of the Civil Code, the types of trading entities comprised by letters d-g are: general partnership, limited partnership, limited liability company, joint-stock company, limited partnership by shares. Art 1888 (1) h). Provides the cooperative types and the special law that regulates them is Law no.1/2005.

Art.1888 provides the types of entities that can be set-up by the legal personality companies and the special law regulates the registration, organization and functioning of these new entities. Art. 1888 (1) letter i) provides "another expressly regulated type of legal trading entity" a category that can comprise the companies regulated by Law 15/1990 and the European company. "the special law" also represents the regulation of the trading entities having an exclusive object of activity such as: banking – the credit institutions; leasing- the leasing companies; insurance – the insurance companies, or the regulation of the companies listed on the capital market. Relevant to the present study is the general framework in the field of company law, constituted by Law 31/1990, consolidated on the common law in the field of trading entities represented by the provisions of the Civil Code, as the trading entities regulated as such act as a vehicle for the investments made in Romania, including foreign investments. On the subject of the trading entities regulated by special laws see Turcu & Botina, 2013, p.10-16.

Law 31/1990 provides in art.1 the right to associate in view of forming a trading entity and art.2 provides in a limiting manner the types of trading entities with legal personality that can be formed through the association and regulates the set-up, organization and functioning of these forms which are: general partnership, limited partnership, limited liability company, joint-stock company, limited partnership by shares (see the critique of the types of trading entities with legal personality regulated by Law 31/1990 and proposal of amendments in Piperea, 2012, p.313).

The classification of the types of trading entities with legal personality provided by Law 31/1990 is provided by the doctrine (Carpenaru, 2012, p.142,145; see the types of trading entities also in Cadariu-Lungu, 2014, p.239-249) from which we shall not drift away, neither for the aspect of the different criteria used, nor in what concerns the classification resulted by applying the criteria. We must mention that the relevant and that which transcends from the study of the trading entities as follows, based on the types of trading entities indicated, represents the "philosophy" of the extent of the partners' liability for the company's obligations.

The classification based on the extent of the partners' liability for the company's obligations in accordance with the previously cited doctrine is the following: trading entities where the liability of the partners/shareholders is limited – the limited liability company and the joint-stock company; trading entities where the partners' liability is unlimited – the shareholders of the general partnership and the partners of the limited partnership.

Interference between the types of professionals and the applicability of the insolvency proceedings

Having analysed the types of professionals and their classification, a legitimate question arises: to which of them is the insolvency proceedings applicable? The answer can be found in art.3 of Law 85/2014 on insolvency and means to prevent insolvency, according to which professionals, as defined by art.3 (2) of the Civil Code, are susceptible of going through the insolvency proceedings. Consequently, any of the trading entities examined in the previous chapters, in the case of fulfilling the conditions expressly provided by the law, may fall under the field of application of Law 85/2014 and may become subjects of the insolvency proceeding, with the mention on the applicability of the insolvency proceedings and the autonomous rules, an entity that has not been previously analysed.

The exceptions to this rule apply to professionals who carry out liberal activities, as well as for those for whom are provided special regulations for the insolvency regime:

"Art.3 (1) The proceedings provided by the present law apply to professionals, as they are defined by art.3 (2) of the Civil Code, except for those who carry out liberal professions, as well as for those to whom are applicable special provisions on insolvency".

(2) the proceedings provided by the present law applies to autonomous administrations as well.

(3) the proceedings provided by the present law is not applicable to the educational entities and institutions and to the entities provided by art.7 of the GO no.57/2002 on scientific research and technological development, approved with amendments and supplements by Law no.324/2003."

Another important mention to be made is grounded on the provisions of art.38 (1), according to which the insolvency proceedings, as simplified proceedings, is applicable to any person that carries out activity proper to professionals, and that did not obtain the authorisation requested by the law for the operation of an enterprise and is not registered in the special registries for publicity. The second thesis of art.28 (1) (f) provides that the "application of the present law in the case of these persons does not exclude the sanctions applicable for the missing authorization or registration of the respective person".

This way it is eliminated the voidness in regulation during the enforcement of Law 85/2006 – insolvency law, repealed by the entrance into force of Law 85/2014 on the applicability of the proceedings on the persons that are not authorized or registered but have carried out trading activity. An example would be the entities that carried out

activities of construction of buildings in order to sell them, the so-called "real estate developers" regarding whom the case-law, by interpreting the provisions of the old Commercial Code and those of the GO 44/2008, concluded that in certain cases they can become subject of the insolvency proceedings (judgements ruled through civil decision no.5102/2011).

Although having carried out "activities proper to professionals" even in the absence of an authorisation or registration legally provided for the respective activity attracts for that entity the applicability of the regulations in the field of insolvency, in the simplified proceedings. The scope of applicability of provisions of art.38 (2) (f) may include the simple partnership or the partnership through which is carried out an activity proper to professionals or by professionals. What the legislator wanted to achieve was mainly the possibility to eliminate the restraint on the applicability of the regulations in the matter of insolvency, following the call of the principle « *Nemo auditur propriam turpitudinem allegans* », generated by carrying out an unauthorized and/or unregistered economic activity.

All the categories falling under the provisions of art.38 (1) (f) are submitted to insolvency in the simplified procedure, defined by art.5 (47) as being the insolvency proceedings "through which the debtor that fulfills the conditions provided by art.38 (2) enters directly in the bankruptcy proceedings, either when the insolvency proceedings are opened, or after a period of observation of maximum 20 days, during which there shall be analysed the elements provided by art.38 (2) c) d)". Art. 38 (2) together with the field of application explained at letter f) contains from a to e the categories to which the simplified proceedings is applied, with the explanation that for letter c) 4 conditions are required to be individually fulfilled for the application of this proceedings:

« Art. 38. -(1)The general proceedings provided by the present chapter applies to debtors mentioned in art.3, except for those to whom the simplified procedure is applied.

(2)The simplified procedure provided by the present chapter is applicable to debtors in an insolvency state, which fall under one of the following categories:

a)Natural persons professionals having the obligation to register in the trade registry except for those who carry out liberal professions;

b)familyenterprises, members of the family enterprise;

c)debtors that are part of the categories provided by para. (1) and fulfill one of the following conditions:

1.do not hold any asset in their patrimony;

2.the constitutive documents or the accounting documents cannot be found;

3.the administrator cannot be reached;

4.the registered/professional office does not exist anymore or does not match the address in the trade registry;

d)legal persons dissolved voluntarily, judicially or as of right, previously to the introductory claim, even if the judiciary liquidator has not been named or although he was named the mention regarding his naming was not submitted to the trade registry;

e)debtors who declared, through the introductory claim, their intention to enter bankruptcy. »

We conclude that, from the types of trading entities examined in the previous chapters, in the case of fulfillment of the conditions expressly provided by the law, some entities shall enter *ex lege* in the simplified proceedings, namely:

- the entities provided by art.38 (2) a) b): natural person professionals – sole trader and individual enterprise; (except for the liberal professions, art.5 (52) the liberal profession is the profession carried out based on a professional qualification, personally granted, on one's own liability, independently, involving activities of intellectual nature in the client's interest and serving public interest. The characteristics of these professions are: the existence of a Code of Ethics, the continuous professional development and confidentiality in relation with the client) family enterprises, members of the family enterprise;

-the entities that fulfill one of the conditions provided in art.38 (2) c):

1.do not hold any assets in their patrimony;

2.the constitutive documents or the accounting documents cannot be found;

3.the administrator cannot be reached;

4.the registered/professional office does not exist anymore or does not match the address in the trade registry;

-the facts provided in art.38, (2), d) –the legal persons dissolved voluntarily judiciary or as of right, previously to submitting the introductory claim even if the judiciary liquidator has not been named or although he was named the mention regarding his naming was not submitted to the trade registry.

For the accuracy of the study we make reference to some definitions provided by Law 85/2014, the definition of insolvency, joint proceedings, bankruptcy proceedings, general proceedings :

" Art.5, (29)- insolvency is that state of the debtor's patrimony which is characterised by insufficient available funds for paying the uncontested, liquid, enforceable debts as follows:

a)the debtor's insolvency is presumed when after 60 days from the due date he has not paid his debt to the creditor; the presumption is relative;

b)Insolvency is imminent when it is proved that the debtor will not be able to pay his enforceable debts on due, from the money he owns on due date;"

" Art.5, (44) – the collective proceedings is the proceedings through which the creditors jointly contribute to the pursuance and recovery of their debts in the means provided by the present law;

« Art.5, (45)- the bankruptcy proceedings is the the insolvency proceedings, collective, that applies to the debtor in order to liquidate his assets so as to cover the passive, followed by the debtors's removal from the registry;

« Art.5, (46)-the general proceedings represent the insolvency proceedings provided by the present law, through which a debtor fulfills the requirements provided by art.38 (1) without simultaneously fulfilling the requirements of art. 38 (2), entering gradually after the observation period in the judicial reorganization procedure and in the bankruptcy proceedings or separately only in judicial reorganization or bankruptcy proceedings;

The simplified proceedings is defined by art.5 (47) as representing the "insolvency proceedings provided by the present law, through which the debtor that fulfills the requirements provided by art. 38 (2) enters directly into the bankruptcy proceedings,either on the opening of the insolvency proceedings or after a period of observation of maximum 20 days, during which the elements provided by art. 38 (2) c), d), shall be analysed.

« Art.5, (42)-the period of observation is the period comprised between the date the insolvency proceedings is opened and the date of confirmation of the reorganization plan or if applicable, the date of the bankruptcy initiation;"

Otherwise, the period of observation of maximum 20 days within the simplified insolvency proceedings can be granted only in the case where the debtor did not enter directly into the bankruptcy proceedings on the initiation of the insolvency proceedings,was created in order to analyse the elements provided by art.38 (2) c) d).

At the same time, irrespective of the type of trading entity the creditors are part of, those creditors who declared through the introductory application – application for the initiation of the proceedings, their intention to enter bankruptcy, shall enter directly into the simplified proceedings according to provisions of art. 38 (2) e) (see Tandareanu, 2014, p.15-18 for the field of regulation of Law 85/2014).

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