

DISCUSSION ON THE APPLICATION OF RULES GOVERNING COMPANIES' ACTIVITY ON INDIVIDUAL ENTREPRENEURS IN MOLDOVA

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ABSTRACT *According to legal regulations the entrepreneurial subjects are profit-oriented legal persons and individuals who have achieved this status through state registration or otherwise provided by law. Entrepreneurial activity can be carried out only in the forms prescribed by law. Legal persons for profit are governed by the Civil Code and other special laws (Law on limited liability companies, Law on joint stock companies). About individual entrepreneur Civil Code provides that there are applicable the rules that regulate the activity of legal persons for profit if in the essence of legal relations results not otherwise. By this study we intend to identify the situations when the rules governing the activity of the companies are to be applied to individual entrepreneurs and when not.*

KEY WORDS: *entrepreneurial subjects, Civil Code, the rules, legal persons*
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The right to engage in entrepreneurial activity has its foundation in the Constitution, which confirms freedom of trade, freedom of economic initiative and fair competition. Entrepreneurial activity can be carried out only in the forms provided by law. The field of organizational forms of entrepreneurial activity has been the subject of several laws: Regulation of economic companies nr.500/1991, Law on Entrepreneurship and Enterprises nr. 845/1992, Law on Joint Stock Companies, Law on Cooperatives etc. the Law nr. 845/1992 was the basic legal act regulating entrepreneurial activity until the entry into force of the Civil Code in 2003 (some authors consider it as a small commercial code). Whereas by this Law entrepreneurship has been legalized and also its legal organizational forms have been established. However, the first law adopted in the field did not correspond fully with the requirements of appropriate regulation of business relations

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and the legal status of subjects of entrepreneurial activity. During the years 1997-2008 there have been adopted several laws that have replaced the previous ones or have essentially modified them. So the Civil Code no. 1107/2002 replaced Law no. 845/1992 on legal persons for profit. Thus, subjects of entrepreneurial activity are legal entities for profit and individuals who have acquired this quality through state registration or otherwise provided by law.

Referring to legal persons for profit, they are regulated by the Civil Code and also by other special laws: Law on Joint Stock Companies, Law on Limited Liability Companies, Law on State Enterprise, Law on business cooperatives and others. As for the individual entrepreneur, the Civil Code in Article 26 stipulates that the individual has the right to practice entrepreneurial activity without constituting a legal entity from the moment of state registration as an individual entrepreneur or otherwise provided by law. By reference to the law, we say that the entrepreneurs are individuals who have obtained patent for business, and those who set up the farm. These latter forms of activity are regulated by a special law each and with regard to registered individual entrepreneurs, there isn't a law governing unitary and completely his activity also his legal status. In these circumstances, the rule settled in Article 26 point (3) of the Civil Code is to be taken in consideration. It says that on the business activity without establishment of legal entity operate the rules that regulate legal person for profit if from the essence of the law or legal relations does not result otherwise.

Further, we intend to identify the legal situations when on the individual entrepreneur are to be applied rules specific for legal persons for profit and the situations resulting when the essence of the relations requires otherwise. For the first time individual entrepreneurial activity was regulated by Law no. 845/1992 as individual company. From the provisions of this law individual company contained some elements of legal person: company formation, "the patrimony property of the company based on the property of the founders", "the firm of individual company", provisions regarding the director which is specific for companies. Thus, it created the illusion of two distinct subjects - individual enterprise and its founder or founders, which is not legally correct, as the subject of entrepreneurial activity is the individual who set up the enterprise. In the context of Law. 845/1992, individual enterprise was not endowed with legal personality, it "belonged to its founders with the right of private property", the founder exercising rights, also assuming obligations and getting e all profits made, also him being responsible with all his assets for the results of his activity. In the statement "enterprise of the entrepreneur", consider enterprise as an object, a property complex through which the entrepreneur achieved profitable the activity. In 2007 it is adopted the Law on State Registration of legal persons and individual entrepreneurs that regulates the registration of individuals as individual entrepreneurs, which contained a clause whereby all individual companies registered before the entry into force of law had been equated with individual entrepreneurs, and would not be registered again. Thereby, the provisions of Law no. 845/1992 on individual enterprise shall lapse and not be applied for individual entrepreneurs. The Law on state registration of legal entities and individual entrepreneurs regulates only the procedure of registration and cessation of activity. The problem is to find rules regarding other aspects of private entrepreneurs, such as the business, professional rights and obligations, the extent of trade capacity etc. While in Law no. 845/1992, the legislature wishing to warn that individual enterprise is not endowed with legal personality expressly stated that it is

part of legal relations as natural person, the Civil Code presents another approach and states that on the activity of individual entrepreneurs rules that regulate the activity of legal persons for profit are to be applied... Starting from the idea that the rules for legal persons for profit will not be applied to individual entrepreneur when a situation or another is expressly governed by a rule of law, and when otherwise is required from the essence of legal relationship. According to the Civil Code legal persons for profit are the companies, the cooperatives of manufacturing and business and also the state and municipal enterprises. As state and municipal enterprises are specifically entrepreneurs, where the founders are only the state and the territorial administrative units, we consider that the norm contained in Article 26 point (3) the legislature had in mind, in fact, only rules on companies.

The time of occurrence of the right to carry out entrepreneurial activity has generated some discussion in the legal literature; it appears with the person's birth or at a later time. Individual's right to pursue entrepreneurial activity occurs with the state registration as legislator in the Civil Code stipulates. Human ability to conduct business falls within the generality and universality character of the legal capacity accorded at birth. Some authors define active and passive entrepreneurship. Business activities involve the participation of person and passive activity does not involve personal activity, such as ownership of shares or shares. In this situation, we explain that the entrepreneur is the company and not the shareholders or stockholders. Also remember that "traders are those who commit acts of trade, with trade as a regular profession," requires the completion of juridical acts regularly. Therefore, the individual must have the ability to acquire and exercise their rights, to assume and the perform obligations, that is with obtaining full legal capacity. With state registration, the individual's exercise capacity expands; he acquires the capacity that allows him to conclude commercial contracts for business activity.

The content of commercial capacity of individual entrepreneur. Following the Articles 17-19 of the Civil Code, we say that the individual may conclude any legal act not forbidden by law to achieve his civil rights, including for getting profit. Since there is no rule restricting individual the activity of individual entrepreneur we consider to be applicable the rule settled in Article 60 point (2) of the Civil Code, which provides that profit legal entity may conduct any activity not prohibited by law, even if not indicated in the constitutive act. In the same context, we insist that individual entrepreneurs can practice not only one, but several types of activities. Therefore, entrepreneurs can carry several types of activities within the law, a conclusion which results according to the Law no. 220/2007 which states in Article 33 that the State Register of Individual Entrepreneurs register, among others, the main activity. Note that entrepreneurs cannot perform those activities specified by the legislature as state monopolies, natural monopolies, and the activities for which the law expressly indicates a joint stock company (banking, insurance). Also, it can't be deployed as individual business activities those for which the law imposes a minimum social capital (the activity of Pawnshops, gambling) because, given the uniqueness of the patrimony, social capital is specific only for companies.

Business activity is conducted according to certain general rules, no matter who is the subject of law: the natural or legal person. We have in view the rights and obligations inherent in entrepreneurial activity or professional obligations: the obligation to obtain a license when required, to keep accounts, compliance with competition rules, consumer protection, payment of taxes, environmental protection.

The rule laid down in Article 60 point (6) of the Civil code, that some activities whose list is established by law can be applied only under a special permit called license also applies to individual entrepreneurs. In this respect, Law no. 451/2001 on regulating the licensing of entrepreneurial activity requires that the license holder it is a legal entity or natural person who has obtained a license for such activity. Accordingly, the procedure for issuing the license, the license terms, the reasons and procedure for suspension and withdrawal of license are uniform both with for-profit legal entities as entrepreneurs and for individuals. Another professional obligation for entrepreneur is to keep an accounting of activity, under current regulations in Accounting Law no. 113/2007 and National Accounting Standards. Law no. 113/2007 applies to all businesses and individuals engaged in entrepreneurial activity, which includes entrepreneurs, except for individuals performing activity based on entrepreneurship patent, they are exempted from bookkeeping, according to the law on entrepreneurship patent. The entrepreneur will do the accounting of all transactions relating to its assets. Accounting object is the reflection in cash of all assets (movable and immovable, tangible or intangible) of cash, and the all the operations, reflecting revenues, expenses and results. Due to the uniqueness of property, remember that the person can only have one patrimony and is liable for its obligations with all his goods. However, it will define the assets used in business and operations with them, because he will keep the accounts only on the patrimony used in business, without taking into account personal goods that are not used in the activity generating profit.

The entrepreneur must operate within the limits of fair and the licit competition. Competition is considered lawful if exercised in good faith, within the law, of fairness and honesty in business without infringing the rights and freedoms of other entrepreneurs. Lawful competition is the basic form of competition in which competitive behavior of the entrepreneur is exercised in good faith and in accordance with honest practices in order to safeguard the existence and expansion of its business. It is prohibited for entrepreneurs to perform acts of unfair competition, including by denying competitors, by misleading consumers regarding the quality of goods, method and place of manufacture, unauthorized use of a trademark, the logo of another economic agent by copying the shape, packaging and appearance of goods of another trader, as well as commercial espionage. The latter is unlawful obtaining of information which is commercial secret, use or disclosure of it. Entrepreneurs who violate the obligation to practice within the limits of fair competition, carries civil and criminal liability.

Individual entrepreneurs, as well as legal entities may use employees work. Accordingly, entrepreneurs can hire an administrator to manage the activity and complete juridical acts in the name and on behalf of him. In this case, it is necessary to delimit the responsibility. For example, if as a result of an activity consumer's rights are violated civil liability lies with the individual entrepreneur. We believe that the relationship between the entrepreneur and his business manager, as in the case of legal entities, are subject of mandate rules, if the contract does not stipulate otherwise.

It deserves attention also the case when individual entrepreneurs fail to fulfill pecuniary obligations. Thus, the provisions of Article 619 in conjunction with 585 of the Civil Code conclude that delay penalties, if the contract does not involve consumers, are 9% higher than the refinancing rate of the National Bank of Moldova. We believe this rule applies in the case of individual entrepreneurs, although they are individuals.

In the end, we address the problem of cessation of individual business activity. According to the Law nr.845/1992, individual enterprises are subject of liquidation in the same way as the legal persons for profit. In this sense ruled the Plenum of the Supreme Court of Justice in its Judgment no. 38/2004 on the application of economic courts of the legal provisions relating to dissolution of businesses. According to that judgment, the legal norms related to dissolution of legal persons will be applied to individual entrepreneurs as well. We consider this recommendation as without legal foundation and incorrect. First, the Law no. 220/2007 stipulates expressly cases of termination of individual entrepreneur's activity, also expressly states that it ceases to operate by removal from the State Register. It is neither necessary nor appropriate the liquidation procedure to the entrepreneur's patrimony, as it is liable with all his goods as an individual, in general terms of limitation, whether or not removed from the State Register. Fortunately the Supreme Court recently returned to change that decision as explained before.

So, on the activity of the individual entrepreneur applies the rules governing the activity of legal persons for profit, not those governing the formation, dissolution or liquidation of them.

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