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ORIGINAL PAPER

Inaccessibility to the status of founder of the companies regulated by Law no. 31/1990 for natural persons authorization in the forms regulated by O.U.G. no. 44/2008

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Abstract
The natural persons authorized in the forms regulated by O.U.G. no. 44/2008 (in particular as PFA and as holders of individual enterprises), who wish to set up commercial companies, raise the question regarding this legal possibility. The answer is not explicitly offered by the Romanian legislator. However, the analysis of the various legal provisions allows the identification of a solution and its argument.

Keywords: *founder; trading company; O.U.G. no. 44/2008; Law no. 31/1990.*

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General considerations regarding the relevant regulatory sources

In regulatory terms, the interrogation theme regarding the possibility of the self-employed persons according to the legal forms regulated by the Government Emergency Ordinance no. 44/2008 to be founders of the companies are exclusively subject to the special legislation. We take into account the Companies' Law no. 31/1990 and the Government Emergency Ordinance no. 44/2008 regarding the performance of economic activities by self-employed persons, unincorporated enterprises and family undertakings.

A. Law no. 31/1990 is the framework-law in the matter of the companies, the legal regime which they establish as being overall applicable for any such legal entity.

For the companies established in fields of activities or state-owned (e.g.: Government Emergency Ordinance no. 99/2006 regarding credit institutions and the capital adequacy; Government Emergency Ordinance no. 109/2011 regarding corporate governance of the public enterprises) which are with priority applied, and their supplementation is performed with the provisions of the Companies' Law as common law in the matter. Irrespective of the companies' type, both certain subsidiary regulations (e.g.: Civil Code, Civil Procedure Code, tax law, criminal law, labour and social security law, etc.), and also the European legislation (e.g.: EU Directive 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of Company Law) are relevant for them (for details see Tuleașcă, 2018: 27-28).

In terms of terminology, the Law no. 76/2012 for the implementation of the Law no. 134/2010 regarding the Civil Procedure Code (Art. 18 point 1 and 3 and Art. 77) has removed the term "commercial" from the phrases "commercial companies' law/commercial company/commercial companies". This regulatory approach is classified into the trend of commercial de-regulation initiated by the lawmaker once with the implementation of the current Civil Code and supplements the approach in terms of the company forms nominated by the Art. 1888 Civil Code where the companies had already been re-named "companies". However, the phrase *commercial companies* continues to be used in practice, in the literature and in the current language. The justification results from the fact that the use of the previous terminology does not alter the content of the legal institution (Angheni, 2019: 120), instead it facilitates the delimitation of the commercial companies from other types of companies.

In the absence of a regulatory definition of the commercial company, in the literature (Cărpenaru, 2019: 119 et seq.; Bălan, 2000: 43; Ţăndăreanu, 2003: 79) different versions have been formulated. In all cases, the starting point is the definition of the articles of association assigned by the Civil Code (currently Art. 1881 para. 1) as common law in the matter of the companies. In turn, although it does not contain a definition of the commercial companies, the Law no. 31/1990 devotes the persons' right to associate for establishing companies with legal personality, setting-up specific conditions and formalities necessary in the matter.

We deem that the *commercial company* is that legal entity resulting from the willing manifestation of generally minimum two natural entities and/or legal entities, materialised in a memorandum of association, based on which contributions are made for the performance of a lucrative activity (production, trade or service supply) in order to achieve and share the resulting benefits.

The companies regulated by the Law no. 31/1990 can be set-up only in one of the forms expressly and exhaustively determined by the imperative norms, namely as: a) general partnerships (SNC); b) limited partnership (SCS); c) joint stock company (SA); d) limited partnership with a share capital (SCA); e) limited liability company (LLC). Usually, the legal form of this type of legal entity is the founders' options, but it can be also imposed by the lawmaker, as an exception.

Regarding the resumption of the constitution principle of the freedom to associate within the Law no. 31/1990 (Art. 1 para 1) we deem that certain delimitations are imposed. Although doctrinally (Cărpenaru, 2019: 154) the idea according to which the freedom to associate (established by Art. 40 from the Romanian Constitution) guarantees the set-up of commercial companies, is claimed, we remind the fact that the constitutional standardisation and the determined jurisprudence of the Constitutional Court in the matter (e.g.: Decision no. 333/2002; Decision no. 38/2000) approach the freedom to associate as „being a fundamental right of the citizens (....)", and the „rights and freedoms of the legal entities, irrespective of their form of organisation or the fact that they are under the private or public law, do not represent the object of the regulations contained in the provisions of the Title II from the Constitution" (Smarandache, 2008: 131-132). However, this restrictive vision from the constitutional norms does not preclude, at other levels of the positive law, the explicit acknowledgment of the capacity of holder of the freedom to associate, including for legal entities (for details see Smarandache, 2012: 143-155; Rădulețu, 2012: 137-142).

B. Government Emergency Ordinance no. 44/2008 regulates the access to business activities from the national economy, the procedure to be recorded in the Trade Registry, to authorize the operation and legal regime of the self-employed persons to perform business activities (PFA), as well as the individual undertakings and family undertakings.

Government Emergency Ordinance no. 44/2008 practically acknowledges the legal forms under which the natural entities can perform the business activity, namely: self-employed person (PFA), individual undertaking and family undertaking. These three legal types of legal status are defined as business undertaking, the legal subject being the natural entity which organizes the business undertaking and which holds the title of entrepreneur (Art. 2 letter g)-i) from the Government Emergency Ordinance no. 44/2008).

In line with the Government Emergency Ordinance no. 44/2008 (Art. 2 letter f), *the business undertaking* is the business activity performed in an organized manned, permanently and systematically, combining financial resources, labour, raw materials, logistical means and information, on the entrepreneur's risk, according to the cases and under the terms provided by the law. Regarding the business activity, the regulatory meaning is the one of lucrative activity, consisting of manufacturing, managing or alienating goods or service provisions (Art. 2 letter a) from the Government Emergency Ordinance no. 44/2008), being able to be performed in all the fields, jobs, occupations or professions which the law does not forbid expressly for the free enterprise.

The self-employed person (PFA) is the business undertaking, without legal personality, organized by a natural entity which mainly uses its own manpower and professional skills.

The individual undertaking is the business undertaking, without legal personality, organized by a natural entity entrepreneur.

The family undertaking is the business undertaking, without legal personality,

organized by the members of a family. The family undertaking consists of 2 or more members of a family. The notion of a family concerns the husband, the wife, their children who have reached the age of 16 upon the authorization date of the family undertaking, the relatives and in-laws up to the fourth grade inclusively. (Art. 2 letter d and Art. 28 para. 1 from the Government Emergency Ordinance no. 44/2008)

Capacity of a founder in view of the Law no. 31/1990

In its essence, any commercial company is a contract (represented by its articles of association setting it up and determining its characteristics) and a legal entity (the assignment of the personality being the corollary of the legal procedure covered after the draw-up of the articles of association).

In all the cases, the company's articles of association must observe the *substantive conditions and the formal conditions* provided by the law (Art. 1179 from the Civil Code, with the particularities resulting from the Law no. 31/1990), in order to be deemed validly concluded, must materialize *the elements specific to any memorandum of association* (the shareholders' contribution, *affectio societatis*, achievement and distribution of the profit) and must contain *the minimum mandatory clauses* imposed by the Law no. 31/1990 (Art. 7-8), in consideration of the specificity of each company form.

The answer to the question regarding who can set up a company is given by the provisions of Art. 1 para. 1 themselves from the Law no. 31/1990, which determine the possibility of natural entities and legal entities to associate and to set up companies with legal personality in order to perform lucrative activities.

The phrase „founders" designates, according to the Law no. 31/1990 (Art. 6 para.1), "the signatories of the articles of association, as well as the persons that have a determining role in setting-up the company". The last category of founders is regulated only for the companies with capitals set-up by subscription by the public. These persons can decide, either to remain only as promoters of the company's set-up (preserving the status of non-signatories founders of the articles of association), or to participate in the subscription by the public and to acquire, if applicable, the capacity of subscribers (if they subscribe shares for the building-up of the share capital), accepting entities (if, based on the subscription, they paid-up the social contribution according to the law) and subsequent to the set-up the capacity of shareholders.

After the set-up, the signatories founders are assigned as associates (in individual undertakings and in limited liability companies) or shareholders (in joint stock companies) (for details about the differences between these two capacities, see: Minea, 1994: 42-43; Bratiș, 2008: 153 and 162). However, the used terminology is generically the one of *associates*.

The natural entities and/or legal entities founders, signatories of the articles of the association for a company, must have the capacity to contract. This substantive condition is deemed fulfilled if the future associates hold the full legal capacity. The provisions of the Civil Code (Art. 40) regulated inclusively the anticipated legal capacity of the minor who has reached the age of 16 which can be recognized by the family court for good cause.

The need for the legal capacity to contract to exist is deducted from the company's specificity, in the sense that through its articles of association the signatories founders assume the obligation to contribute whose performance implies mainly an act of disposition, with effects on the personal patrimony.

In the matter of the incapacities relevant for the founders, the Law no. 31/1990 (Art. 6 para. 2) was not limited only to taking over the rules of common law, but also set-up specific rules.

Regarding the incapacities of common law, their source is the current Civil Code (art. 43 para. 1) which determined that "except for other cases provided by the law: the minor who did not reach the age of 14 and the interdict do not have the legal capacity". Capitalising on the civil law in the matter, the company's law expressly forbidden the access to the capacity of a company's founder for the persons who, according to law, are lacking the capacity.

In the literature, the participation of the uncapable minors in the conclusion of an articles of association is one of the themes still under dispute. The doctrinal opinions, if applicable, support this possibility either through the legal guardian (under the terms of Art. 41 and 43 Civil Code), as form of investment (Cărpenaru, 2019 :147), or only as associates in an existing company, through inheritance or legal deeds, *inter vivos* entrusted by the legal representative (e.g.: donations, purchase agreement) (Piperea, 2012 : 156), or reject the version of participation based on the impossibility to cover a special incapacity through the norms of common law in the matter of capacity (V. Găină, 2017: 216).

As a particularity, the special incapacities are regulated both by the Law no. 31/1990, and also by certain special laws. Therefore, considering Art. 6 para. 2 from the company's law, those persons also cannot be founders for whom, although capable, there is a final court resolution through which they are forbidden the right to exercise the capacity of founder as a complementary punishment for the crimes expressly and exhaustively determined by the legislative act 9crimes against the patrimony by infringing the trust, corruption crimes, embezzlement, false statements, tax evasion, crimes provided by the Law no. 129/2019 for the prevention and fighting against money laundry and financing of terrorisms, as well as for the amendment and supplement of other legislative acts, the crimes from the company's law0.

In addition, certain special incapacities are established also by other legislative acts for different categories of persons considering the exercised profession or the held title. As an example, the Law no. 303/2004 regarding the status of judges and prosecutors forbids for the judges and prosecutors to hold the capacity of associates (...) in „companies, credit or financial institutions, insurance/reinsurance companies, national companies" (except for those who acquire it following the law regarding mass privatisation), and in case of acquiring of this capacity through inheritance the magistrates are obliged to take the necessary measures, so that the analysed capacity would end within maximum one year since its actual acquirement date (Art. 8 para. 1 letter c, para. 1^1 and para 2).

Until the amendment of the Law no. 31/1990 repealing the provisions of Art. 14 para. 1-2 enters into force, we remind that in the case of the limited liability company with sole shareholder, the capacity of founder must observe also the following two special interdictions, namely: a natural or legal entity can be sole shareholder only in one limited liability company, and a limited liability company cannot have as sole shareholder another limited liability company composed of a single person.

Therefore, the capacity of founder for a company is exclusively accessible to natural and legal entities (irrespective of their citizenship or nationality) who fulfil the conditions provided by the lawmaker for this status (including the type of restrictions)

and legally expresses the consent for the purpose of participating in the set-up of the company.

Usually, for the set-up of a company the will manifested at least by two natural and/or legal entities is necessary. In the limited partnership and in limited partnership with share capital there must be at least a general partner and an active partner. As an exception, the Law no. 31/1990 (Art. 4) admits the possibility of setting-up a company also by the will manifested by a sole person, embodied only in the memorandum (in the case of the limited liability company with sole shareholder). Regarding the maximum number of signatories for articles of association, the company's law imposes such a restriction only for the limited liability companies, which cannot have more than 50 shareholders.

Inaccessibility of the founder status to the forms regulated by the Government Emergency Ordinance no. 44/2008

Related to the provisions of the Government Emergency Ordinance no. 44/2008, the self-employed person (PFA), the individual undertaking or family undertaking are business undertaking organized by natural entities under the terms of this legislative act. To start the business activity under the forms of PFA, individual undertaking and family undertaking, the natural entities have the legal obligation to request the recording in the Trade Registry and the authorization to operate (Art. 7 from the Government Emergency Ordinance no. 44/2008 and Art. 1 para. 1 from the Law no. 26/1990), context in which the conditions related to the access to the business activity are verified (for details Stuparu, Ognyan, 2018: 27-29; Smarandache, 2011: 61-62; Stănescu, 2019: 96-99).

The lawmaker enables the access to the three legal statuses regulated by the Government Emergency Ordinance no. 44/2008 for any natural entity, Romanian citizen or citizen of any other member state of the European Union or the European Economic Area, based on the right of free initiative, the right of free association and the right of establishment.

For the natural entities recorded and authorized as self-employed persons, individual undertaking or family undertaking, the Government Emergency Ordinance no. 44/2008 makes certain capacities (employer, employee, cumulation of legal statuses) accessible and sets-up as restriction the impossibility of cumulating the statuses of self-employed person with the status of holder of an individual undertaking (Art. 17, Art. 25 and Art. 28 para. 2 and 4 from the Government Emergency Ordinance no. 44/2008).

The interpretation of these rules in terms of the analysed theme points out the following cases. On the one hand, irrespective of the legal form according to which it is set up (self-employed person, individual undertaking or family undertaking), the natural entity can cumulate the relevant capacity with the capacity of employee of a company which operates in the same field or in other field of business activity than the one for which it is authorized. On the other hand, the family undertaking and the natural entity entrepreneur authorized as self-employed person or individual undertaking can determine contractual relations (even exclusively) inclusively with companies for the performance of the business activity, without changing their legal status (for the argumentation that "shall not be deemed an employee of third parties with whom it collaborates", see Decision of the Romanian Constitution Court no. 425/2019).

However, neither the Government Emergency Ordinance no. 44/2008, nor the Law no. 31/1990 contain explicit regulations regarding the cumulation of the capacity of

founder of a company with any of the statuses of self-employed person, individual undertaking or family undertaking. In other words, in none of the two legislative acts there is any explicit interdiction (e.g. as in the case of the legislation relevant for the magistrates), or in the sense of a direct permission (e.g. in the case of associates, foundations and federations for which Art. 47-48 from the Government Ordinance no. 26/2000 regarding associations and foundations enables the set-up of companies). Therefore, the answer can be formulated and argued only through the interpretation of the body of these two special laws.

As above mentioned, at the basis of setting-up any company there lies the exercise of the freedom of association acknowledged by the Law no. 31/1990 exclusively for the natural entities and legal entities. Regarding the three legal forms under which the natural entities can perform the business activity according to the Government Emergency Ordinance no. 44/2008, both their framework law (Art. 2 letter g-i), and also the national jurisprudence (e.g.: Decision of the High Court of Cassation and Justice (CDC/P) no. 1/2016), assert for them the lack of the legal personality.

Therefore, the strict reporting to the principle of free association points out clearly the idea of impossibility for the self-employed person (PFA), individual undertaking or family undertaking to be, taking into account these statuses, founders of a company. The subject of law, such natural entity, is the entrepreneur and not the business undertaking which the entrepreneur organizes under the legal terms as self-employed person, individual undertaking or family undertaking. To sum up, the status of forms to perform business activity for natural persons and the absence of a legal personality, explicitly established by the Government Emergency Ordinance no. 44/2008, excludes the self-employed person, the individual undertaking and family undertaking from the category of natural or legal entities and implicitly from the category of potential founders of companies.

For the founders of companies, exclusively natural entities and legal entities, the mutual element is holding the legal personality.

In the case of natural entities, the legal personality is inherent to them, being assigned, without exception since its birth and is preserved until its death (Ungureanu, Munteanu, 2005: 180-189; Voirin, Goubeaux, 2003: 45).

In the case of legal entities, their existence claims the set-up only under the forms and under the methods of set-up established by the lawmaker. According to the provisions of the Civil Code, the elements granting the legal personality are the standalone organization, own patrimony and legal and moral scope, in line with the general interest. When for the legal entities the authorization of the set-up deed is mandatory, this procedure completes the component attributes of the legal personality (Art. 187-188, Art. 190 -191 or Art. 194 from the Civil Code).

Regarding the legal forms for the performance of the business activity such as self-employed person, individual undertaking and family undertaking, these cannot be deemed natural entities or legal entities. The capacity of natural person is reserved exclusively to the entrepreneur who organizes them as business undertakings (Art. 2 letter e) from the Government Emergency Ordinance no. 44/2008). Regarding the capacity of legal entity, its absence is grounded, on the one hand, by the express will itself of the lawmaker not to assign to them the legal personality (Art. 2 letter g) -i) from the Government Emergency Ordinance no. 44/2008), and on the other hand by the non-fulfilment of the component elements of legal personality determined by the Civil Code. In other words, the current legal framework does not enable the inclusion in the sphere

of legal entities for self-employed person, individual undertaking or family undertaking, being deprived by the capacity of legal entity within the meaning of the theses Art. 187 and Art. 188 Civil Code. Regarding this last aspect, the cumulative elements generating legal personality, we deem appropriate certain clarifications.

Common for these three legal forms regulated by the Government Emergency Ordinance no. 44/2008 is the permanent absence of the element "standalone organization", the reminded framework-law not mentioning in any disposition about the existence of certain own bodies, with clear attributed, which would intervene in the performance of the business activity specific for the analysed business undertakings or about the possibility of a subdivisions of the performed activities.

There is a tone only in the case of the family undertaking, imposed by the specificity of this business undertaking in which two or more members of the same members must participate. In this case, the lawmaker determined the obligation to appoint a representative, through the consent of setting-up the family undertaking, which will manage its interests based on a special proxy, under the form of a private deed, signed by all the members of the undertaking who have the legal capacity and the legal representatives of those with limited legal capacity (Art. 27 para. 1-2 from the Government Emergency Ordinance no. 44/2008). The thus appointed representative shall make the decisions regarding the current management of the family undertaking, fulfilling under the terms of the Government Emergency Ordinance no. 44/2008 (Art. 31) acts of disposition on the assets affected by the activity of the family undertaking, and also acts through which the assets are acquired for its activity. We deem that this representative cannot receive the capacity of own body of family undertaking, such as own bodies of a legal entity (e.g.: companies benefit from a deliberating and decision-making body, a management and leadership body, as well as management control body)(for the meaning of the phrase "standalone organization" see Baias, Chelaru, Constantinovici, Macovei, 2012: 171-172). The difference from the legal treatment is justified by the different cases in which there are the categories subject to analysis, the family undertaking - as business activity organized under the legal terms by a natural entity - and the company- as subject of law for the legal entity. Within the legislative limits imposed by the Government Emergency Ordinance no. 44/2008 and the will of the family undertaking's members, the representative of a multivalent role. This acts, if applicable, at the decision-making, administrative and representational level, without excluding the participation in the actual performance of the business activity and in supporting the liability for the contracted debts, besides the other members, under the legal terms and according to the set-up agreement.

In return, the business activity performed by the self-employed person, individual undertaking and family undertaking always has a "purpose", namely a lucrative purpose (Art. 2 letter a from the Government Emergency Ordinance no. 44/2008).

Regarding the "patrimony", the natural entities recorded in the Trade Registry and authorized under any of the legal forms regulated by the Government Emergency Ordinance no. 44/2008 have the ability, at this point or subsequently, during its operation, to decide the set-up of dedicated assets (with the legal regime outlined by the provisions of Art. 20, Art. 26 and Art. 31 from the Government Emergency Ordinance no. 44/2008). According to the provisions of Art. 2 letter j) from the Government Emergency Ordinance no. 44/2008, the dedicated assets are "the trust within the entrepreneur's patrimony, representing all the dedicated rights and obligations, through

written statement or, if applicable, through the set-up agreement or through an addendum hereto, for the performance of a business activity". To the extent of setting-up by the will of the natural entity entrepreneur, this professional patrimony becomes a general pledge only for professional creditors, who have "professional" receivables (Piperea, 2012: 564) resulting from the exploitation of the business undertaking, the competition of the personal creditors of the debtor entrepreneur being excluded. In the case of the insufficiency of the asset elements from the dedicated assets, the professional creditors shall be able to pass to the pursuit of the debtor's personal patrimony in order to capitalize on its receivables, the rules of the common law in the matter of the creditors' competition being to be applied (to criticize this legislative solution which prevents the entrepreneur to protect his personal patrimony from the pursuit of the professional creditors, see Tuleașcă, 2012).

In conclusion, the interpretation in corroboration with the provisions integrated within the content of the Government Emergency Ordinance no. 44/2008 points out that the three component elements of the legal entity, provided by the Art. 187 Civil Code are not fulfilled in none of the case of the three legal forms whose regime they are setting. The self-employed person to perform the business activity in any of the legal forms determined by the Government Emergency Ordinance no. 44/2008 is the one remaining as subject of law, but acquires a special status, with all the legal consequences resulting therefrom. The holder of the rights and obligations resulting from the relevant legislative framework is the natural entity entrepreneur himself, separate subject of law, and by no means his undertaking. Therefore, only the natural entity, irrespective of its enterprising status within the meaning of the Government Emergency Ordinance no. 44/2008, can be founder of a company regulated by the Law no. 31/1990, under the terms set-up by it.

However, we consider in the sense that in the future the lawmaker could resort to a legislative amendment in the matter of the capacity of founder of a company so that the natural entities could participate in the set-up of the company, including in taking account their entrepreneur status recorded and authorized as self-employed person, individual undertaking or family undertaking. In the case of such a possible legislative amendment the access to the capacity of founder would be allowed, for example, to an entrepreneur (within the sense of the Government Emergency Ordinance no. 44/2008) who has dedicated assets set-up, among which there are ownership rights on certain assets (which enables him to perform the mandatory contribution imposed by the Law no. 31/1990 to each future associate, necessary to build up the patrimony and social capital) or when the object of his business economy consists of acquiring mobile assets (including such as stocks, shares or equity stakes).

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