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LEGAL STATUS OF FIRMS –MAIN CONTRIBUTORS TO ROMANIAN PUBLIC BUDGET

Mihaela TOFAN*

Abstract: *Public expenditure and collection of public resources generate interactions among different subjects of law, natural and legal persons, subjects of public law and private law. These interactions are the main object of the financial regulation, both at domestic and EU level. The legal relations are part of social relations and the companies legally formed are subject to the execution of the financial and fiscal liabilities, which is ensured by the state authority. Financial legal relations are distinguished from other legal relationships by the specific connection that occurs between the contributors and the state authority representative. The subjects involved and the position they have towards each other is subject to regulatory act and, if needed, court of law determination and control.*

In legal theory, the time of crises determine deep mutation in the legislation in force and the papers shows some of these changes and conclude on some aspects to be improved.

Keywords: firm; legal status; Romanian law

JEL Classification: K22; K34

Introduction

Commercial activities imply interactions among different subjects of public law and/or private law, natural and legal persons, from their interaction resulting liabilities in connection to financing public expenditure and insuring public financial resources. These interactions and the way the parties conduct their activities are the main purposes of financial regulations and rules of law.

In legal theory, the state authority executes social relations that fall under the law provisions, referring precisely to the form of expression for permitted or mandatory conduct that a person is entitled to have. Financial legal relations are distinguished among other type of social relationships by their specific features. The rules of tax law express the rights and obligations of the parties to fulfil the arrangements for the establishment, exercise and termination of an activity in connection with the public finance.

Financial relation regulation and tax law apply only in financial activities carried out by a subject of law, in connection with the state authority. In these situations, without exception, one of the subjects is the state representative with precise power of action in this field, represented by a public institution. This characteristic of financial and tax law relations can be analyzed in detail, based on the idea that the priority of the state itself aims at providing the framework that will ensure the financial resources for an organized life and welfare of the people. Moreover, the rule of law is

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adopted in order to serve the citizens and not to oppress them. In this context, the subordination of the individuals to the state authority may generate extensive discussions. (Balan, 1999, p.53)

However, it is impossible to conduct financial activities of the state as a prerogative of the state authority, unless it is expressly stated in the law in force the contributors to a specific fund and the public authority with collection responsibility for that particular fund.

1. The firm: the narrow and the wide sense of the concept

In order to conduct a commercial activity, the law requires a series of appropriate working tools, depending on the topic of trade (office furniture, raw materials, goods, equipments, patents etc.). All these goods used by the company to operate its activities form the physical support of the goodwill. In a concise definition, goodwill is a set of movable and immovable, tangible and intangible goods, which are affected by a business operator, in order to attract customers and hence to maximize the profit. (Stoica *et al.*, 2008)

The patrimony of a company does not have a uniform composition, each trader using the goods which best satisfy its business interests. Elements of goodwill may change according to the specific needs of the business, but some elements of goodwill are absolutely mandatory and it is not possible either to begin or to continue a business in their absence (e.g. the commercial name or the firm and the minimum capital required by law).

The firm, the concept usually describing the company or trade name, represents an identity mark of the entrepreneur on the market and among other traders. According to art. 30 of Law no. 26/1990 (the law ruling the activity of the Official Trade Register in Romania), the company should have a particular name, required for registration procedure and also mandatory for the exercise of its activities. If there is an individual trader, the name of its activity (the individual company's name) consists of the name of the trader entirely written, or his/he name and surname or his/her name and initials. (Tofan, 2012, p. 60)

For unlimited partnership, the name of the company must contain the name of at least one associated with the expression "partnership company", written in full.

A joint liability partnership company shall have the name of at least one general partner associations with the word "limited partnership", written in full.

A limited liability company or a company by shares has a name of its own, in order to distinguish it from the others companies on the specific market. This name will be accompanied by the words written entirely "limited liability company", or "LLC", or, as appropriate, "SA" (share

company). Article 39 of Law no. 26/1990 provides that the Official Trade Register shall refuse registration of companies when there are no elements of contrast or in any case that may cause confusion with other legal registered companies' name.

The name of the registered companies for commercial activity is not available two years from the date of withdrawal of the company from the market. (Tofan *et al.*, 2014) As an intangible element of goodwill, the name of the company may be object of a commercial transaction, but only together with the whole activity of that firm.

If there is a breach of the company's name, for example when another company is registered with the same name, the first registered company may appeal to the court of law for violation of its properties and request the cancellation of the second registration, under the provision of the art. 25, Law no. 26/1990. In any case, the owner of the infringed right may claim for damages under the civil code provisions.

The use of a company's name may lead to confusion with another company. Intentional use of a company's name by another trading company constitutes the offense of unfair competition (Article 5 of Law 11/1991, amended by Law no. 298/2001) and will attract criminal liability of the offender.

The meaning attributed to the concept of company name identified above belongs restricted to the narrow vision of the "firm" concept.

In the wider sense of the concept, the name of the company is the word that describes any activity and assets of the company, the attribute that distinguishes the company on the market and the title the company is allowed to operate with, in order to get profit. Benefits obtained by the legal entity, using its official name, are equally important to the public authorities' representatives, as the company is subject to taxation.

So, in the wider sense of the concept "firm", seen as the company's name, it overlaps the concept of taxpayers. The taxpayer and the tax receivable debtor may be any natural or legal person who owes taxes and other contributions to the public budget, in accordance with the tax laws.

2. Companies – contributors to national budget in Romanian legal framework

Due to the particular purpose envisaged at the time that they were formed, the state and its territorial administrative units, associations and foundations may not act as a trader. According to Romanian Civil Code, subjects of law are either individuals or legal entities. Legal entities with profit-oriented activities are considered traders and they may be organized as:

- Companies; their legal status is regulated by Law no. 31/1990 companies law; (Leaua, 2008,

- Public National Companies (designated by RA, from the Romanian name “regii autonome”); they conduct business in areas of public interest and are established by government decision (when the interest that they are managing is important for the whole country, e.g. Coal National Company, Tobacco National Company), or by decision of the local counsel (when the interest is relevant on local level, e.g. Water and Waste Local Company)

- A special place in our legislation economic interest groups, whose legal status is regulated by Law no. 161/2003 on measures to ensure transparency in the exercise of public dignities, public functions and business environment, the prevention and punishment of corruption. Title V of this act provides the legal framework for two categories of groups: groups at national level and European groups.

Economic Interest Group (GIE) is regulated in the Romanian law, considering the first established group in France (order no. 67/821 of 23 September 1967). In French law, the activity of a GIE is very interesting for its members because it is a company in the proper sense and still it does not get taxable income. The French group of interest shares its benefits directly to its members, being taxed only at this time. Under Romanian law (art. 118), an economic interest group is an association of two or more natural or legal persons, established for a certain period of time, in order to facilitate or develop the economic activities of its members and to improve the results of that activity. (Angheni *et al.*, 2008)

Considering its specific activity and the interests of associate members, the Romanian group of economic interest may act as a commercial or noncommercial entities, with patrimonial purpose of their performed activities or without such intentions. The group activities may be related to the economic activities of its members or it may only be accessory to them.

The law provides a number of limitations imposed to activities carried out by a group of economic interest. They may perform the following operations:

a) to exercise, directly or indirectly, the activity of administration or supervision of the activities of its members, particularly in the areas of personnel, finance and investment ;

b) to hold shares, shares or interest, directly or indirectly, to one of the member companies; ownership of shares, shares or interest in the other company is permitted only to the extent that it is required to meet the objectives of the group and if it is on behalf of its members;

c) to employ more than 500 people;

d) to credit one of the members (in circumstances other than those expressly provided by Act no. 31/1990 on trading companies, republished, with subsequent amendments), the administrator or director of one of the members or a husband or close relatives to the fourth degree inclusive of the

administrator or the director concerned. It may credit also if the lending operation implies civil or commercial actors to which one of the persons mentioned above is administrator or director or holds, alone or together with one of the persons mentioned above, a share of at least 20% of the subscribed capital;

e) to be used by a member for transmission of goods, in circumstances other than those expressly provided by Law no. 31/1990, republished, with subsequent amendments to and from the manager or company director or spouse, relatives up to the fourth degree of the administrator or the director concerned. Also it is allowed to transmit goods if the operation implies civil or commercial actors, to which one of the persons mentioned above is administrator or director or holds, alone or together with one of the persons mentioned above, a share of at least 20% of the subscribed capital with unless one of these companies is a subsidiary of the other;

f) to be a member of another group of European economic interest or economic interest group

g) to issue shares, bonds or other securities .

Similarly to companies' legal status under Romanian law, economic interest group shall be established by agreement signed by all the members, who must be authenticated. Within 15 days of the authentication of agreement, the founders or managers or a representative group of them will require registration in the Official Trade Register in whose jurisdiction the group is based. The law provides in depth rules on the establishment, operation and closure of a GIE, rules that prove legal status trader of such businesses.

The law also regulates European economic interest group, or EEIG. According to art. 233 from the specific law, European economic interest group is the combination of two or more natural or legal persons, constituted for a fixed or indefinite period, in order to facilitate or develop the economic activity of its members and improving the results of that activity. There may be members of a European Economic Interest only:

a) companies or firms within the meaning of art. 165, paragraph 2 of the consolidated version of the Treaty establishing the European Community and other legal persons governed by public or private, that fulfill the following conditions:

-it was established under the laws of a Member State of the European Union ;

-it has its registered office, main center of leadership and management of statutory activity in a Member State of the European Union;

b) individuals engaged in industrial, commercial, craft, agricultural, providing or other commercial activities in a Member State of the European Union.

European Economic Interest Group shall be composed of not less than:

- i. two companies, firms or other legal entities whose main centers of leadership and management of statutory activity are located in different Member States;
- ii. two individuals, operating in different Member States;
- iii. a company, a firm or other legal person whose principal place of leadership and management of statutory activity is in a Member State and a natural person whose principal activity is in another Member State.

We note that European economic interest groups are not subject to the authorization provided in Decree-Law nr. 122/1990 for the authorization and operation of foreign economic organizations, which hold representative in Romania. Establishment of branches or subsidiaries in Romania by an EEIG will be subject to all the provisions relating to registration, indication and publishing documents and facts required for Romanian economic interest groups.

3. The legal status for individual contributors who perform commercial activities

The individuals who perform commercial activities are also contributors to the state budget, when they are considered traders and they gain profits. Individuals who have a merchant status must perform activities considered by law as having commercial features, as regularly as a habitual profession and with the intention of obtaining profit. The analysis of such situations should be done in detail, because often individuals are relying on their status as subjects without commercial facets, in order to limit debts to the state budget. As it is easy to guess, the tax law is stricter with the taxpayer than with the individuals who does not perform commercial activities.

Analyzing the legal framework, we synthesize that contributors are individuals who meet the following conditions:

a) A natural person who commits acts of trade, activities with the intention of gaining profit objectives. Acts of trade objectives are activities considered by law to be commercial because of their concrete specificity and regardless of who carries them. We should note that this situation is slightly outdated, as the list of such activities was included in the provisions of the Romanian Commercial Code, which is no longer in force. Still, we may establish the commercial character of an activity by comparing to another legal listing in force at the moment, for example, national economic activity code, database updated annually.

Commercial nature of the performed activity determines the liability of such subject of law not only to the trade and competition demands, but also to the tax law requirements.

b) Committing acts of trade occurs as a habitual profession;

The second condition for individuals to be considered trader refers to committing acts of trade professionally, a condition satisfied when this activity is a permanent occupation exercised by a person. Therefore, a person who accidentally makes a trade operation becomes merchant only at the moment when the operation becomes so frequent, so it characterizes a habitual profession (Angheni, 2013, p. XVII).

Professional character of the conduct of trade is a matter of fact, which in case of dispute between traders or in relation to bodies of state authority, may be proved by any means permitted by law. Romanian law system usually refers to evidence from witnesses, documents, presumptions and expertise. Commercial features of transactions come from a very wide range of evidences, the celerity of trade transactions necessarily assuming simplifying the procedures for taking evidence.

Character of a habitual profession implies the existence of two elements for each commercial operation committed by individuals: a fact (*factum*), which consists of systematic exercise and repeated acts of trade targets, and a psychological element (*animus*) that relate to intention to become a trader, i.e. to acquire a certain social condition or status.

c) Committing acts of trade takes place in its own name and not on another person's behalf.

The third condition ensures legal point of demarcation between the individual who acts as a trader for himself and the individual who does trade operation for other persons. In this later situation, there are persons used in business that have the capacity of an agent or a dealer representatives and they are not professionals of trade when committing a commercial activity.

The literature has discussed whether the cumulative fulfilment of the three conditions is sufficient or appropriate, some authors considering adding the legal capacity as a condition for becoming individual trader (Piperea, 2005, p. 211).

We appreciate that the proper exercise of rights and liabilities (legal capacity of individuals) may not be considered a special condition in this case, because it is implicit in each of the three conditions above. If an individual fails to full legal capacity, he cannot commit acts of trade, in his own benefit and as a profession.

Regarding the registration that the individual has to do previously to acting as a trader, it is an administrative act and the individual trader is obligated to do, under the sanction of fine and not under the penalty of prohibition from exercising acts of trade. Therefore, obtaining the registration number is not a requirement to become an individual trader, but a professional obligation.

We note that the acquisition of individual trader status does not take place in a very well established moment, in comparison with the legal status of a company, for which the moment of its valid status is precise. Thus,

- Companies are traders on the moment of their registration in the Official Trade Register;

- RAs are traders on their establishment by Government decision (RAs with national importance) or the Local Council disposition (RAs with local interest);
- GIE and EEIG are traders on setting up authentication of their agreement act.

On the contrary, the individual trader has its legal status when all the above three conditions are fulfilled. Merchant acquiring quality does not occur at a precise time. In case of disagreement on the legal status of a trader, it is necessary both to the bodies of state authority and to the bodies of the judiciary to take evidence on the activity and the qualities of the individual. Similarly to establishing the moment of acquiring the status of trader for a legal person, the evidence of the legal status of trader is different for individual trader and for legal persons.

To prove their individual trader status, the natural person have to prove all the conditions needed to achieve that status (the three conditions presented above). The existence of the administrative authorization (the registration document) does not constitute proof of a trader. The use of the title of trader for an individual in his business correspondence, in connection with other people or in advertising material does not constitute proof of the legal status of the individual trader, unless other evidence in support can corroborate it.

On the contrary, for corporate legal status, merchant quality test is always done by documentary evidence. For companies, the sufficient proof of their legal status is the registration certificate, obtained after completing all the steps for setting up a company, according to the law in force. For RAs, the proof is the registration certificate or the government decision/local council disposition.

Once acquired a trader legal status, it attracts specific obligations, including the status of taxpayer, according to the law in force. These obligations remain until the termination of the activity of the trader.

For individual trader, the legal status ceases once the cumulative conditions of the legal establishment are no longer fulfilled. Since the intention to cease committing acts of trade can be temporary and can be resumed after a time, each particular case requires attentive investigation, to establish whether there is an intention to terminate the commercial activity or only to suspend it for a while. Loss of authorization to practice trade does not mean loss of the legal status of the individual trader.

If a trader commits no acts of trade for a certain period of time, evidence of lack of intention to continue trading is done. The mere cessation of activity temporarily cannot lead to the idea that the individual is no longer a dealer.

According to art. 222 of Law no. 31/1990, republished and amended, companies cease to be a trader by dissolution and liquidation. In fact, the entry into force of company dissolution does not

automatically invalidate the quality of the trader. Legal personality of the company disappears with the last operation wound. However, for tax purposes, there is an important change of obligations when the company enters into insolvency, in comparison to the trader whose financial situation is theoretically stable. According to Law no. 85/2014 (Insolvency Code), trader insolvency situation is different in terms of fiscal responsibility, the law is more tolerant and provides a range of facilities.

Situations that could lead to the dissolution and liquidation of companies are numerous, from the agreement of associates, bankruptcy, end of the period for which the company was established, the realization of the object of activity or impossibility of it, and failure to conditions imposed by law to continue commercial activity.

3. Types of organization for individual trader's activity

Although conservative and traditionalist, the Romanian commercial law in force could not completely ignore the situation of individual traders, or the important place they have among the contributors to the state budget. The activities carried out professionally by individual traders often dress coat of practice that relate directly to making a profit and, therefore, their trade is deliberately unnoticed because of too large legal framework on this issue. In order to solve these cases and to attract more revenue to the state budget, Romanian law ought to outline new ways for providing control over income-generating activities for the individual, from the fiscal liability point of view. Although not comprehensive, we appreciate that rules for the individual enterprise activities, family enterprises and authorized individuals have limited results, because of possible tax evasion loopholes.

According to legal framework in force (Govern emergency ordinance no. 44/2008, amended, completed and republished in 2014), individual enterprise is an economic enterprise, unincorporated, organized by an individual entrepreneur; family enterprise is the economic enterprise, unincorporated, organized by an individual entrepreneur with his family and the authorized individual is a person who is authorized to carry out any form of economic activity permitted by law, mainly using its workforce.

Their legal status is slightly different, but the legal text allows individual entrepreneurs to choose the form that fits best their needs, depending on their specific activity and the context of achieving income (Cristea, 2008, p. 158).

In relation with this regulation, we note first of all the change of the establishment and authorization procedure. Thus, as noted above, the legal status of an individual trader is a fact and the registration is just a mandatory procedure in order to operate legally, an obligation that may attract administrative penalties (administrative fines). Art. 7 of GEO no. 44/2008 provides that individual enterprise, family business and authorized individuals are required to apply for registration in the

Official Trade Register before commencing business as freelancers, hereinafter PFA, family business and respectively individual enterprising. Considering the individual enterprise, the prevision of law in force is more accurate. The representative of a family enterprise must apply for registration and authorization before starting the business. If he does not make the request within 7 days after the conclusion of the procedure provided for the establishment of law, any member of the family business may apply for registration and authorization (Cod fiscal, 2014).

We note that this time the formality of registration in the Official Trade Register has influence on the setting up procedure itself. Demand for trade registration and authorization of the operation must be made within 15 days starting the date of conclusion of the agreement to form the family enterprise and in case of violation of the prescribed period, it is necessary to conclude a new agreement.

Legal regime regulating the activity of PFA states that such a subject of law may collaborate with other freelancers, sole proprietors and holders of individual enterprises or representatives of family enterprises, or other natural or legal persons, to carry out an economic activity, without changing his legal status. As a limitation of the sphere of activity, the law provides that the PFA can hire third parties for the work, which has been authorized, using labor contract. Also, a person can accumulate the quality of the individual authorized person and the quality of an employee of a third party that works, both in the same area or in another area of economic activity than the one the PFA is authorized for.

PFA is beneficiary in the public pension system and other social insurance rights and he/she is entitled to be insured under the social health insurance and unemployment insurance, as provided by law. These rights and obligations are expressly included in GEO no. 44/2008, indirectly explaining the fiscal liabilities of PFA. PFA operates using mainly his/her labor capacity and occupational training in the field of trade, which is authorized and registered. PFA may ask for changing the legal status, needing to obtain subsequent authorization as a private company, under the conditions imposed by law for this different legal status of business performance that is intended.

PFA is liable for his/her obligations with the assets affected to the specific trade and, in addition and in case of insolvency, with all his/her assets. PFA will be subject to the simplified procedure provided for by Law no. 85/2014 (Code of Insolvency).

As expressly permitted in GEO no. 44/2008, individual enterprise acquires legal status of trader through registration in the Official Trade Register. According to art. 23 of this act, the individual enterprises are considered trader, starting the date of their registration.

Individual enterprises shall not be considered an employee of third parties that he collaborates with, under the provision of art. 24, even if collaboration is exclusive. Individual enterprise may aggregate and may draw an employment contract with a third party that works both in the same area and in another area of economic activity.

From the point of view of the fiscal liabilities, the holder of an individual enterprise is insured in the public pension and social security system and is entitled to be insured under the social health insurance and unemployment insurance. The person holding the individual enterprise is liable for his obligations with the assets affected to the trade activity, if it was created, and in addition, with his/her entire assets. In case of insolvency, the individual enterprise will be subject to the simplified procedure provided by Law no. 85/2014 (Code of Insolvency).

In case of death of the person who holds the individual enterprise, the heirs may continue the business, whether they express their intention through an authentic statement within six months from the date of the succession debate. When there are several heirs, they will appoint a representative to continue business as a family enterprise.

Family enterprise consists of two or more members of a family. Members of a family enterprise can be simultaneously PFA or holders of individual enterprises. Also, they can hire third parties as employees, even if they work in the same area or in another area of economic activity than the one who held the family enterprise. In their position of contributors to the budget, members of family enterprise are insured in the public pension system and other social insurance rights and are entitled to be insured in the social health insurance and unemployment insurance, as provided by law.

Exactly as PFA does, family enterprise may engage third parties using the employment contract, so the company can benefit from the work of its own employees, but indirectly through individual enterprises and/or PFA within it.

According to art. 29 of GEO no. 44/2008, the family enterprise is established by agreement of incorporation, signed by family members in writing, as a condition of validity. The agreement will stipulate the names and surnames of members and of the representative of the family enterprise, date of the participation of each member of the enterprise, conditions of participation, the percentage shares that will divide the net income of the business, the relationship between members and the family enterprises and the conditions for withdrawal. All these clauses are to be present in the agreement, under the penalty of nullity. Representative designated by the establishing agreement should manage the family enterprises interests, with a special mandate, respectively a document with private signature. This power of attorney is to be signed by those members of family enterprise who have legal capacity and legal representatives of those with limited capacity.

In order to perform the work for which it was authorized, the family enterprise, through its representative, may collaborate with other freelancers PFA, individual traders and holders of individual enterprises, representatives of family enterprises or other natural or legal persons. For performing a more efficient economic activity, the family enterprise is able to change its legal status, with the procedure provided by law.

Family enterprise has its own heritage and acquires legal personality through registration in the Official Trade Register. By agreement establishing the family enterprise, members may stipulate the establishment of a heritage of affectation or may set quotas for the participation of members of the heritage setting of affectation. If members must agree unanimously on the quotas, which may be different from those required for participation in the net income or loss of the enterprise.

Members of the family enterprises are the person from its registration in the Official Trade Register or they may be join lately. They are liable for the debts incurred by the company representative with the heritage of affectation, if it was created, and in addition, with the whole heritage corresponding to the rates of participation.

Decisions regarding the current management of the family enterprise are taken by the company representative, who acts by disposition of members of the family enterprise. Their decision on the activity shall be taken by simple majority of the members' consent.

Family enterprises will be terminated and therefore radiated from the trade register in the following cases: more than half of its members have died, more than half of the members of the entity require its termination or retired from the company. Application for cancellation, accompanied by a certified copy of the original documents, as applicable, shall be filed by any interested person, with the Office of Trade Register of the Court in which it was established.

If the members of a family enterprise have heritage of affectation or acquired goods, they share the rates provided for in the constitution agreement.

Conclusions

Regardless the type organization that a trader is choosing for his/her commercial activity, they are the main contributors to the Romanian public budget. In condition of global financial crises, the Romanian legislation suffered many changes, in order to determine the registration and authorization for every subject of law that gains benefits from commercial activity. The final target is to supervise these activities, in order to monitor the accomplishment of the fiscal liabilities and, if needed, in order

to force them to comply with the fiscal law. Although quite large, the regulation in this respect still need improvements and the experience of the paste few years show some of the direction to follow.

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