

COMMENT AND ANALYSIS

PATRIMONY BY APPROPRIATION – AN INSTRUMENT IN BUSINESS OPERATION¹

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Abstract

The patrimony by appropriation represents an instrument in business operation, even the business itself, therefore it is required to regulate it in accordance with the requirements of modern economy.

This paper analyzes and proposes some solutions for the problems of the patrimony by appropriation as instrument by the dint of which a business is operated, as a modern patrimony management technique and as an instrument for limiting commercial entrepreneurs' liability. We consider the full autonomy of the patrimony by appropriation of the traders and their liability limitation for their professional obligations, the companies' possibility of setting up patrimonies by appropriation, and last, but not least, the problem of alienating the "business", i.e. the alienation inter vivos of the patrimony by appropriation, as legal universality.

Keywords: Patrimony by appropriation, limitation of the liability for the professional obligations, securities, entrepreneur, patrimony divisibility, alienation of the patrimony by appropriation

JEL Classification: K10, K20

1. Introduction

The entire issue whose analysis we have undertaken hereby starts from the notion of patrimony and, in the preamble, we will analyze briefly the current legal framework and current opinions on patrimony, its characteristics and forms.

Thus, in the absence of a legal definition, patrimony was defined by the doctrine "as the entirety of rights and obligations of a person, which have or represent some financial or economic value, thus assessable in money"³, with

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³ Hamangiu C., Rosetti-Bălănescu I, Băicoianu Al., *Tratat de Drept Civil Român*, vol. I, Editura All, 1996, p. 522

the following characteristics: patrimony is a legal universality, all people have patrimony, there is no patrimony without a holder, a person can have more than a patrimony.

At the beginning of the 20th century, the field's literature started to question the theory regarding the unity and indivisibility of patrimony, theory based on the metaphysical connection between human personality and its patrimony⁴.

We notice here that the old Romanian law did not fully enact the theory of Mr. Charles Aubry and Mr. Frederic C. Rau, theory which influenced the French law for nearly two centuries⁵, according to which the patrimony is unique, unitary and indivisible⁶. We claim that, provided that the Romanian doctrine which, compared to the Romanian Civil Code of 1864, has considered that the patrimony, although unique, is not always unitary and can be divided into universalities or smaller patrimonies with separate legal regime, this opinion being supported by successive legal regulations of cases when the general patrimony was divided⁷.

Nowadays, a significant step towards the actual divisibility of the patrimony has been made under E.G.O. no. 44/2008 on the economic activities carried out by authorized natural persons (free lancers, self-employed persons), individual companies and family associations⁸, legal regulation regulating the patrimony by appropriation as well. For the first time, the entrepreneurs carrying out economic activities as authorized natural persons, owners of the individual companies or members of a family association (hereinafter natural

⁴ Giacomo Rojas Elgueta, *Divergences and Convergences of common Law and Civil Law Traditions on Asset Partitioning: A Functional Analysis*, U of Pennsylvania Journal of Business Law, vol 12:2, 2010, p. 527.

⁵ Francois Terre, *La personne et ses patrimoines. Des Pepis per milliers*, Revue de Droit Henri Capitant, Nr. 2, 30 june 2011.

⁶ Aubry et Rau, par Etienne Bartin, Cours de droit civil français, 5^{ème} éd., §§ 573 et 574, T. 9, 1917; for the English version of the theory on patrimony of Aubry and Rau, please see: Kasirer, Translating Part of France's Legal Heritage: Aubry and Rau on the Patrimonies, 38 *Revue générale dedroit* 453, 2008.

⁷ Hamangiu, Rosetti-Bălănescu, Băicoianu, op.cit., p. 523; C. Bîrsan, *Drept Civil. Drepturi reale principale*, Editura Hamangiu, Bucharest, 2007, pp. 10-11; Valeriu Stoica, *Drept Civil. Drepturi reale principale*, Editura Hamangiu, Bucharest, 2004, p. 47-96; for the analysis of the history of patrimony theories, please see: Valeriu Stoica, *Patrimoniul de afectatiune – Continuitate și reformă*, Revista Româna de Drept Privat (Romanian Magazine of Private Law) no. 2/2013, pp. 13-23;

⁸ E.G.O. no. 44/2008 on economic activities carried out by authorized natural persons, individual companies and family associations, published in the Official Gazette Part 1 no. 1 328 of April 25, 2008, as further amended and supplemented.

person merchants) can establish patrimony units assigned to carry out some activity, distinctly from the general lien of their personal creditors.

The Romanian Civil Code of 2011 stipulates the principle of the patrimony's divisibility and indicates that it includes all rights and debts of a person, which can be assessed in money (art 31, paragraph (1) of the Civil Code). In this respect, the patrimony can make object of some division or appropriation, but only under the conditions and cases stipulated by the law. Thus, the division of patrimony is possible only in the cases stipulated by the law and the grounds of such division are a legal act or deed in its narrowed meaning.⁹

The patrimonies by appropriation, as regulated by the provisions of art 31, paragraph (3) of the Civil Code as patrimony divisions, are: fiduciary patrimony units, those assigned to carry out a certified profession and other such established patrimonies.

There are opinions, according to which, through the regulation of the divisibility of patrimony and patrimonies by appropriation, the Romanian law has given up the theory of patrimony uniqueness¹⁰.

In our opinion, the current legal framework keeps the patrimony's uniqueness and the legal regulation of the patrimony's divisibility is relevant only in terms of the patrimony's unitary nature¹¹. Moreover, even the wording of art 31, paragraph (1) of the Civil Code: "Any person has a patrimony" indicates the law-maker's decision to keep the unique nature of patrimony.

The patrimony by appropriation appears as "fraction of universality"; it is a legal universality including rights and obligations connected through the purpose of their appropriation, created by the exclusive will of the general patrimony's owner and ascertained by the law.

⁹ Valeriu Stoica, *Drept Civil. Drepturi reale principale, op.cit.*, p. 8.

¹⁰ Gheorghe Piperea, *Drept Comercial. Întreprinderea*, C.H. Beck Publishing House, 2012, p. 60; Roxana-Mariana Popescu, Evelina Oprina, *Fiducia și implicațiile acesteia asupra executării silite*, Revista Româna de Executare Silită (Romanian Magazine of Enforced Execution) no. 4/ 2011, p.72; Radu Catană, *Drept Comercial. În PowerPoint*, Editura Universul Juridic, Bucharest, 2013, p. 97; for the same opinion compared to the Civil Code Quebec, please see: Macdonald, *Reconceiving the Symbols of Property: Universalities, Interests and other Heresies*, *McGill Law Journal*, vol. 39, 1994, p. 776-777, available at website: <http://lawjournal.mcgill.ca/documents/39.4.Macdonald.pdf>

¹¹ Flavius Baias, E. Chelaru, R. Constantinovici, I. Macovei, *Noul Cod Civil*, C. H. Beck Publishing House, 2012, p. 35; Irina Sferidan, *Patrimoniul profesional individual afectat desfașurării unei profesii liberale în reglementarea Codului civil* (Law no. 287/2009), Revista Dreptul (the Law Magazine) no. 7/2012, p. 44; Related to keeping the unitary nature of patrimony, please see: Valeriu Stoica, *Patrimoniul de afecțiune – continuitate și reforma*, op.cit., p. 22;

The entrepreneur has a general patrimony wherein one or several separate units of patrimony can be established, called patrimonies by appropriation and assigned to reach a certain purpose. In such case, the general patrimony (the standard notion) is divided into patrimony by appropriation and personal patrimony (types), both special patrimonies being included in the general patrimony of the entrepreneur-owner.

We are not concerned by the entrepreneur's goodwill because it has no special influence of the entrepreneur's liability towards their creditors. The exclusion of this institution from our field of interest resides in the fact that the goodwill, as (actual) universality of goods¹² assigned by the entrepreneur to carry out their economic activity, and is always part of their general patrimony. Thus, there is a relation between the goodwill and the patrimony by appropriation equal to the relation between part and whole, the whole being the patrimony by appropriation, respectively the general patrimony of the merchant¹³.

2. Methodology and research issues

In the beginning, we will analyze the liability for the entrepreneur's patrimony obligations, operating with and without setting a patrimony by appropriation. We will analyze the following for each of the classes of entrepreneurs: the entrepreneur carrying out an economic activity (hereinafter merchant – natural person, respectively merchant – legal person) and the entrepreneur carrying out a (liberal) certified profession such as: lawyer, doctor, insolvency practitioner, bailiff, etc. (hereinafter - the professional). Afterwards, we will come up with solutions and analyze how, given the amendment of the current regulation of the patrimony by appropriation through its full autonomization, a real limitation of the merchants – natural persons can be

¹² Art. 541, paragraph (1) of the Civil Code defines the actual universality as “*the entirety of goods belonging to the same person and have a common destination set by their will or by the law*”; on the other hand, the goodwill is not a legal universality because legal universalities exist only if they are ascertained by the law and the goodwill does not enjoy such confirmation.

¹³ To the same end, Hamangiu, Rosetti-Bălănescu, Băicoianu, *ibidem*, p. 524; Smaranda Angheni, *Drept Comercial. Profesioniștii – comercianți* (Commercial Law. Professionals – merchants), C.H. Beck Publishing House, Bucharest, 2013, p. 35 and the following; Lucia Herovanu, *Dreptul român și patrimoniul de afectățune* (The Romanian law and the patrimony by appropriation), *Revista de Drept Comercial* (Commercial Law Magazine) no. 6/2009, pp. 75-76; Adverse opinion in: Stanciu D. Cărpănu, *Tratat de Drept Comercial Român, Conform noului Cod Civil* (Treatise of Romanian Commercial Law according to the New Civil Code), Editura Universul Juridic, Bucharest, 2012, p. 95;

obtained as regards professional obligations. The patrimony by appropriation can be a true instrument to alienate, based on documents *inter vivos*, the patrimony by appropriation in terms of the Romanian law and the compared law.

3. Patrimony by approbation and the liability of the entrepreneur for their professional obligations

3.1. General statements on the entrepreneurs' liability. According to the general rule stipulated by art 2324, paragraph (1) of the Civil Code, the person who is personally bound is bound by all their movable and immovable goods, current and future. They serve as joint security of their creditors.

Obviously, there occurs the principle of unlimited liability for debts, the general patrimony representing the joint security, the general lien of creditors, principle also found in the Civil Code of 1864¹⁴.

Among the exceptions from the rule, as per art 2324, paragraph (3) of the Civil Code, the creditors whose receivables arise from a certain division of the patrimony, authorized by the law, must first pursue the goods making object of such patrimony unit. If they are not enough to cover the receivables, the other goods of the debtor can be then pursued.

Therefore, by establishing a patrimony by appropriation – the fiduciary patrimony units, those assigned to carry out a certified profession, as well as other such patrimonies – “the general lien of creditors becomes specialized”¹⁵. In other words, the patrimony by appropriation will represent a general lien only for the creditors whose receivables have arisen in relation to this patrimony (hereinafter professional creditors) and the merchant will be liable towards them with the goods from this patrimony.

Moreover, under the provisions of art 2324, paragraph (3) of the Civil Code, an order of priority is set as regards the pursuit of the goods from the entrepreneur's special patrimonies: (i) first, there are pursued the goods from the patrimony assigned to carry out the professional activity and if they are not enough (ii) the goods from the personal patrimony can also be pursued.

¹⁴Gheorghe Piperea, *Diviziunile patrimoniale și confuzia de patrimonii – noi motive de contestație la executare*, Curierul Judiciar no. 9, 2012, p.562.

¹⁵Baias, Chelaru, Constantinovici, Macovei, op.cit., p. 2274; To the same end, Liviu Pop, Ionuț - Florin Popa, Stelian Ioan Vidu, *Tratat elementar de drept civil. Obligațiile.*, Ed. Universul Juridic, Bucuresti, 2012, op. cit., p. 756.

As exception from this rule, if the patrimony's division is generated by the exercise of a certified profession, the creditors, whose receivables arise from such patrimony by appropriation or related to such profession, are entitled to pursue only the goods of the patrimony by appropriation. This exception, stipulated by art 2324, paragraph (4) of the Civil Code, rules as principle as regards the liability of certified professionals for their patrimony professional obligations, rule confirmed by art 727, paragraph (1), thesis I of the Code of Civil Procedure.

And not lastly, in any of the two cases of exceptions, the personal creditors of the entrepreneur do not have access to the goods from the patrimony by appropriation, the competition between the personal creditors of the debtor over their patrimony by appropriation being excluded. In a brief and concise manner, the doctrine deems as receivables or professional debts those arising from the operation of a company¹⁶, and the distinction between personal and professional creditors is made in connection to this criterion.

Therefore, the patrimony by appropriation is “impermeable” from outside, respectively it is relatively independent from the personal patrimony which preserves its permeability as regards the pursuits of the professional creditors of the merchant – natural person.

We will discuss in the following all types of patrimony by appropriation which may lead to the limitation of the entrepreneur's liability towards their professional creditors: (i) the patrimony units assigned by professionals to the practice of a certified profession, respectively the professional patrimonies by appropriation; (ii) the patrimony units assigned by merchants to carry out an economic activity, respectively commercial patrimonies by appropriation and (iii) fiduciary patrimony units, respectively the fiduciary patrimonies by appropriation.

The patrimony by appropriation is, beyond doubt, a technique to organize the patrimony and, at the same time, a way to limit the owner's liability for their professional obligations. In this last case, the reason behind the establishment of such patrimony by appropriation is to obtain the right balance between the economic or professional activity and the risks involved by such activities and the need to protect the personal goods of the entrepreneur and their family.

¹⁶ Gheorghe Piperea, *Diviziunile patrimoniale și confuzia de patrimonii – noi motive de contestație la executare*, op. cit. 564.

3.2. The patrimony by appropriation and the liability of the merchant – legal person for their professional obligations

It is well known the fact that the company with legal personality – the most representative merchant-legal person – is both “a technique to organize a company, a method to assign goods, capitals, rights and obligations to an activity triggered by its object”¹⁷ and a technique to limit the liability of its shareholders.

On the other hand, not any form of association or company to carry out the activity involves the limitation of the shareholders’ liability, but, as a rule, only the companies which have legal personality. A conclusive example is the limited partnership, entity without legal personality, which has a patrimony, but involves the subsequent and unlimited liability of its shareholders for the obligations towards the company’s creditors as per art 1920, paragraph (1) of the Civil Code.¹⁸ Moreover, in cases strictly stipulated by the law, not even the company’s legal personality removes the unlimited and joint liability of the shareholders for social obligations.

For the merchant-legal person, the patrimony by appropriation is obviously not the main tool to protect and limit their liability.

The field’s literature deems that branches, working points and secondary quarters of the legal person are patrimonies by appropriation¹⁹.

In our opinion, branches, working points and other quarters of a company with legal personality cannot be considered as having the legal nature of some patrimonies by appropriation of the parent company.

We firstly consider the fact that there is no legal provision to regulate the possibility for commercial companies to set patrimonies by appropriation, others than fiduciary patrimony units. The principle is the one according to which patrimonies by appropriation can be set only under the terms and cases stipulated by the law and the provisions of art 31, paragraphs (2) and (3) of the Civil Code are mandatory in this respect.

On the other hand, the Law no. 31/1990 on companies, the special law related to the Civil Code, does not stipulate any provision allowing companies with legal personality to set patrimonies by appropriation.

¹⁷Xavier de Roux, *La creation d’un patrimoine d’affectation*, p. 9, available at website: www.ladocumentationfrancaise.fr/.../0000.pdf (last visit on April 9, 2014).

¹⁸ Gheorghe Piperea, *Diviziunile patrimoniale și confuzia de patrimonii – noi motive de contestație la executare*, op. cit., p.563.

¹⁹ Gheorghe Piperea, *Simularea personalității juridice în Noul Cod Civil*, Revista Română de Dreptul Afacerilor (Romanian Magazine of Business Law) no. 1/2012;

Secondly, considering the secondary quarters of the company with legal personality equal to the patrimonies by appropriation could trigger structural changes in the current legal regime of the branch, namely it will be replaced by the one applicable to the patrimony by appropriation, idea difficult to accept in the current legal framework. For instance, as rule, the creditor of “a branch”²⁰, - in law, the creditor of the parent company – pursuing the parent company for the obligations arising from the branch’s activity cannot be opposed by the benefit of excussion. The company’s creditor cannot be compelled to pursue first the “patrimony” of the branch (the patrimony by appropriation from which their receivable arises) and only if the goods are not enough, to act against the “patrimony” of the parent company. If we support the idea of the branch as patrimony by appropriation of the parent company, we should have grounds to claim the provisions of art 2324, paragraph (3) of the Civil Code, which require the primary pursuit of the goods of the patrimony by appropriation, respectively the branch’s, grounds excluded by the current regulation of branches.

Obviously, the company can set patrimonies by appropriation²¹, but only as fiduciary patrimony units as settlor – legal person, right ascertained by art 776 of the Civil Code related to the provisions of art 31, paragraphs (1)-(3) of the Civil Code.

In such case, the trust’s beneficiary can be any person having business relations with the company, the settlor included.

Basically, by setting a fiduciary patrimony unit, the company will enjoy all advantages offered by the legal regime of the patrimony by appropriation, as legal-economic tool to carry out commercial contracts²².

Firstly, in principle, the goods from the fiduciary patrimony unit can be pursued only by the creditors whose receivables arise in connection with these goods.

Secondly, the company can set a fiduciary patrimony unit to secure its own current or future obligations, usually for the following: (i) to secure a

²⁰We take into account the creditor whose receivables arise from legal documents concluded with the branch which has acted in the name and behalf of the parent company, company with legal personality;

²¹To the same end, Gheorghe Piperea, *Simularea personalității juridice în Noul Cod Civil*, ibidem;

²²For details please see: Reinhart Dammann, *Fiducia – garanție și conflictul de legi*, in *Pandectele Române* no. 6/2013.

loan²³, if the loan is not reimbursed, the fiduciary beneficiary-creditor keeps for themselves the goods received under the trust;²⁴; (ii) the management of any of the business making their object of activity, the settlor has the right to be beneficiary at the same time; (iii) to procure financial resources by using the trust as sale with redemption pact.

It is interesting to notice that if a fiduciary patrimony is set to secure a loan, the “fiduciary creditor is the only one who will cover their receivable from the good or the patrimony unit making object of the security unlike traditional securities which, given their nature, can expose the owner to the competition or even to the superiority of other preferred creditors”²⁵.

The opposability of the trust is secured by recording it with the Electronic Archive of Movable Securities and of the movable rights, including real estate securities, making object of the fiduciary contract, in the land book for each individual right.

3.3. The patrimony by appropriation and the liability of the merchant-natural person for their professional obligations

The issue regarding the impermeability of the personal patrimony of the merchant – natural person must be approached from different perspectives: of the merchant, their creditors, the merchant’s family and not, lastly, from the state’s perspective.

The merchant and their family are interested, in difficult situations, in protecting their personal goods or part thereon from the pursuit of the professional creditors.

The merchant however can protect their personal goods, part of the personal patrimony, based on a unilateral statement of goods’ seizure because the Romanian law, unlike the French law, does not ascertain the validity of such expression of will. The restriction is stipulated in art 2329 of the Civil

²³Details on the possibility to take such trust as personal security in : Ion Turcu, *Se poartă fiduciar*, Revista de Note and Studii Juridice, available at: <http://www.juridice.ro/244256/se-poarta-fiducia.html>

²⁴ Dan Chirică, *Noul Cod civil, Direcții de evoluție*, in Revista Pandectele Române no. 4/2013.

²⁵ M. Grimaldi, *L’introduction de la fiducie en droit français in Les transformations du droit civil français*. Universidad externado de Colombia, available at: <http://www.henricapitantlawreview.fr/article.php?id=309>, nr. 11; M. Bouteille, *Les Propriétés conditionnelles*, Presses Universitaires D’Aix-Marseille, 2008, p. 455-456, apud Liviu Marius Harosa, *Scurte considerații asupra fiduciei în reglementarea noului Cod civil*, Revista Română de Dreptul Afacerilor nr. 9/2013;

Code compared to art 617, paragraph (1) of the Civil Code, which allows the confiscation and seizure of an asset only through agreement and will, excluding unilateral legal deeds; even in such situations of exception, the seizure operates only to the advantage of the asset's acquirer.

Apparently, the incorporation of a patrimony by appropriation is foreseen as instrument to limit the liability of the merchant – natural person for their commercial obligations. In fact, this legal construction does not manage to remove the unfairness of the professional merchant's liability with its entire patrimony, moreover both the patrimony by appropriation and their personal patrimony.

We have also pointed out that, according to the law, the merchants – natural persons have the right to allocate a part of their patrimony to carry out an economic activity, establishing a patrimony by appropriation, in any of the forms of carrying such economic activity regulated by the law for them²⁶. The decision to establish such patrimony by appropriation can occur at the beginning of the activity, together with the registration application for the trade registry and the permits for functioning or afterwards, and in this respect the affidavit given especially in this respect and the documents to indicate the payments or the owner capacity.

Following the establishment of the patrimony by appropriation, the merchant can obtain a seizure over the right of the personal creditors to pursue their assets, limiting them to a right of general lien over the personal patrimony even if the goods from this patrimony are not enough to cover their receivables. Therefore, personal creditors cannot have any claims over the goods from the patrimony by appropriation, legal limitation which cannot be removed by the will of the patrimony by appropriation's owner.

The limitation of the right to pursue the patrimony by appropriation does not work as regards the professional creditors of the merchant.

Substantiating their action through the insufficiency of the goods from the patrimony by appropriation, professional creditors can cross the border between special patrimonies, stepping into the personal patrimony of the debtor and pursuing their personal goods. In such case, the personal creditors of

²⁶The case law has ruled in cases having as object the patrimony by appropriation of merchants – natural persons; in this respect, please see: Î.C.C.J., former s.com., decision no. 1072/2009, indicated by Corneliu Birsan, *Drept civil. Drepturi reale principale*, Ed. Hamangiu, 2013, p. 14; Bucharest Court of Appeal, commercial section, Decision no. 3/ January 11, 2010, posted on the website: www.idrept.ro;

the merchant can claim the benefit of excussion against professional creditors until they prove the pursuit of all assets from the merchant's patrimony by appropriation.²⁷

Therefore, for professional obligations, the merchant is bound without limits towards their professional creditors. Unlimited liability has a secondary nature, the merchant being able to claim the benefit of excussion if the legal order of preference is broken when their special patrimonies are pursued.

Thus, *de lege lata*, the merchant cannot protect their personal patrimony from the pursuit of professional creditors.

This situation is improper and unfair because, firstly a different class of the merchant's creditors – their personal creditors – must limit themselves to pursuing the goods from the patrimony from which their receivable arises, infringing thus the principle of creditor quality. On the other hand, the personal patrimony of certified free lancers is untouchable to their professional creditors, the law using, without due reasons, a double standard.

It is necessary to change and supplement the legal regime of the patrimony by appropriation, established by merchants – natural persons in order to establish its independence in connection with the merchant's personal patrimony and the removal of the professional creditors' right to pursue the goods from the debtor's personal patrimony, by "proofing" of the personal patrimony.

Starting from the role of small entrepreneurs in the economy and their needs, the limitation of liability of the merchant – natural person, through the patrimony by appropriation, matches the needs of the practice, is grounded on the legal precedent established by the Romanian law for certified professionals and is already regulated in the legislations of other European states, such as France, Germany and Portugal²⁸.

In France, the protection of the family patrimony of the entrepreneurs – individual merchants is a constant concern and a first step in this direction has been made through a stipulation indicating that the main residence of any individual entrepreneurs cannot be seized. According to the French law of August 1st, 2003 on economic initiative and the statement of the individual entrepreneur regarding the impossibility to seize the main residence,

²⁷Also please see, Liviu Pop, Ionuț-Florin Popa, Stelian Ioan Vidu, *Tratat elementar de drept civil. Obligațiile*, op. cit., p.756

²⁸De Roux, *La creation d'un patrimoine d'affectation*, available on the website: <http://www.ladocumentationfrancaise.fr/var/storage/rapports-publics/084000716/0000.pdf>

professional creditors lose temporary and partially the right to pursue such main residence in order to recover their professional receivables.

The final step was the French law no. 2010-658 of June 15, 2010 regarding the individual entrepreneur with limited liability. This law stipulates the patrimony by appropriation of individual entrepreneurs and indicates that all individual entrepreneurs can allot to their professional activities a patrimony distinct from their personal patrimony²⁹, without incorporating a legal person and their liability for any professional obligations is limited to the goods from the patrimony by appropriation. Professional creditors have a lien right over the allotted patrimony and not over the personal patrimony of the individual entrepreneur.

In Germany as well, the separation of patrimony – called *zweckvermögen* in BGB – allows a person to have several patrimonies. Obviously, patrimony units are fully independent, “the creditors of a separate patrimony can pursue only the goods from such patrimony and the person intended to be protected based on the separation of patrimonies or who has some interest in the separation of patrimonies, can intervene to reject the claims of the creditors who try to force the boundaries of the separate patrimony, acting against other goods from other patrimonies”³⁰.

The protection of the creditors of the patrimonies by appropriation belonging to merchants – natural persons is ensured through appropriate publicity of their limited liability.

Firstly, merchants should have the obligation to inform their partners, under a proper remark meant to draw attention to their limited liability, for instance: “*John Smith, freelancer with limited liability*”, inscribed on all documents issued and/or signed by the merchant, on all advertising materials, etc.

Such publicity should be completed by publicity with the trade registry, respectively the statement regarding the establishment of the patrimony by appropriation, accompanied by a report for the evaluation of the goods included in the patrimony by appropriation and if immovable assets, movable rights and/or other rights are allotted, deeds or legal reports if related to such properties registered with the land book, it is necessary to register the statement

²⁹According to the provisions of art 14 of the French Law no. 2010– 658 of June 15, 2010, an entrepreneur can have one or several patrimonies by appropriation.

³⁰ Johannes Rehahn, Alexander Grimm, *Country Report: Germany*, The Columbia Journal of European Law Online, vol. 18, 2012, p. 99.

regarding the patrimony by appropriation with the land book³¹. Of course, the publicity regarding the establishment of the patrimony by appropriation must be made by registration with the electronic archive of movable securities when such patrimony by appropriation includes security rights for whose opposability the registration with the archive is required.

The limited liability of the holder will, without doubt, characterize the entire existence of the patrimony by appropriation, including its liquidation, either through voluntary liquidation or by bankruptcy of the merchant – natural person.

The professional creditors of the merchant – natural person could also pursue the goods of their personal patrimony in case of fraud and in cases strictly stipulated by the law, during the procedure of bankruptcy.

3.4. Patrimony by appropriation and the liability of the certified professional for their professional obligations

A type of patrimony by appropriation is the patrimony unit allotted for a certified profession or the professional patrimonies by appropriation. Although the notion of certified profession is not stipulated by the law, “a profession certified by the law is the occupation whose specific qualification is defined by the law and the practice of such profession is done according to the legal requirements”³². It is not the capacity of certified persons to carry out a professional activity, the certified persons to carry out economic activities.

Therefore, certified professions include liberal professions: lawyer, doctor, architect, insolvency practitioner, public notary, bailiff, mediator, etc., professions that require professional qualifications and membership in a professional order recognized by the law³³; they are the professionals who can establish an individual professional patrimony by appropriation.

The establishment of the patrimony allotted for the individual practice of a certified profession is set based on the document concluded by the certified professional, in compliance with the conditions of form and publicity stipulated

³¹In this case, the statement has to be in the form of a notarized authentic document as per art 888 of the Civil Code, the registrations with the land book are made based on the notarized authentic document, the final legal ruling, the inheritance certificate or based on another document issued by the administrative authorities if the law stipulates it. For the same, Lucia Herovanu, op.cit., p. 74; Andrea Annamaria Chiș, *Obiectul cartii funciare în lumina Noului Cod civil – dispoziții speciale privind înscrierea drepturilor tabulare*, Revista Română de Drept Privat no. 3/2012, pp. 58 - 99;

³² Radu Rizoiu, *Garanția comună a creditorilor în Noul Cod civil*, Revista Română de Drept Privat no. 1/2012, pp. 170 - 223;

³³ Irina Sferdian, op. cit., p. 43.

by the law and its further modification is possible under a unilateral legal document, according to the provisions of art 33, paragraph (1) and paragraph (3) of the Civil Code.

As indicated above, according to the provisions of art 2324, paragraph (4) of the Civil Code and art 727, paragraph (1), thesis 1 of the Code of civil procedure, the goods from a patrimony unit allotted to the practice of a profession certified by the law, can be pursued only by the creditors whose receivables arise from the practice of such profession; these creditors cannot pursue other goods of the debtor. In other words: “the debts of a freelancer (lawyer, notary, dentist, etc.) are classified as professional and private and, thus, their goods belong to two distinct units”³⁴

As regards the legal effects of the establishment of the professional patrimony by appropriation, we can notice the full proofing of the personal patrimony of the professionals. Naturally, their professional creditors have a right of general lien only over the patrimony by appropriation, excluding all rights over the goods of the professional’s personal patrimony.

It is the major legal difference between the professional patrimony by appropriation and the patrimony by appropriation of the merchant – natural person.

4. Alienation of the patrimony by appropriation

The full separation of the patrimony by appropriation or its full autonomy and the limitation of the merchant’s liability will allow the regulation of the right to alienate the patrimony by appropriation based on deeds inter vivos.

The holder of the patrimony by appropriation must have the right to create, use and enjoy the patrimony by appropriation, to liquidate it³⁵, including the right to use it freely, in the form and for the purpose of its creation³⁶.

It is obvious that we do not concern the alienation of the goods composing the patrimony by appropriation, respectively the alienation of the

³⁴ Paul Vasilescu, *Drept Civil. Obligații*, Ed. Hamangiu, București, 2012, p. 96;

³⁵ The possibility to liquidate the patrimony by appropriation is mainly regulated by art 33 paragraph (3) of the Civil Code.

³⁶ Henri Mazeaud, Leon Mazeaud, Jean Mazeaud, *Fifteen Lesson: Patrimony and Other Universalities of Rights*, Henri Capitant Law Review, No 2, 2011, observation no. 297, available on the website:

<http://henricapitantlawreview.org/article.php?lg=en&id=304> (ultima vizualizare in 5 aprilie 2014).

goodwill in its entirety, although some authors consider that it is the only way to “alienate” the patrimony by appropriation³⁷.

Equally we consider the transfer, with universal title of a patrimony unit belonging to the merchant – natural person, of patrimony units and the not the universal transfer of their patrimony, which transfer is restricted through documents *inter vivos*³⁸.

Accepting and regulating the creation of patrimonies allotted to a certain purpose, of patrimony units whose existence is indissolubly related to the purpose of their creation, we don't see any impediment in alienating *inter vivos* the patrimony by appropriation.³⁹

The principle of the patrimony's inalienability concerns, without doubt, the patrimony in its entirety, excluding patrimony units⁴⁰.

To support this possibility, we underline that the alienation of the patrimony by appropriation is allowed, without objections, by the German Civil Code and the French Commercial Code, as amended under the Law no. 2010 – 658 of June 15, 2010 on the individual entrepreneur with limited liability⁴¹.

In this respect, art L 526-17 –I- of the French Civil Code expressly provides the transfer, based on documents *inter vivos*, of the patrimony by appropriation, which can occur both under a document of onerous title and under a free of charge document, respectively: sale, donation, contribution to a company's patrimony either to natural persons or legal persons⁴².

The documents regarding the publicity of the patrimony by appropriation's transfer must indicate the rights, goods, obligations and movable securities composing the patrimony by appropriation.

The assignee, donee or the contribution's beneficiary becomes the debtor of the individual entrepreneur's loan, in their place and position, but such replacement/subrogation will not be a novation in terms of creditors.

³⁷ Irina Sferidan, *op. cit.*, p. 50-52;

³⁸ E.g.: Valeriu Stoica, *Drept civil. Drepturi reale principale*, Ed. 2, C. H. Beck Publishing House, Bucharest, 2013, p. 18; Corneliu Bîrsan, *Drept civil. Drepturi reale principale*, 2013, *op. cit.*, p. 16;

³⁹ The same opinion: Valeriu Stoica, *Drept civil. Drepturi reale principale*, 2013, *op. cit.* p. 19;

⁴⁰ Adverse opinion in Irina Sferdian, *op. cit.*, p. 50;

⁴¹ Cagnon, L'EIRL et la notion de patrimoine d'affectation, study published on the website: *Universitatea de Drept, Stiinte Politice, Economie, Gestiune, Educatie, Montesquieu – Bordeaux IV*, 2011, available on the website: http://cerfap.u-bordeaux4.fr/sites/cerfap/IMG/pdf/Cagnon_Mylene.pdf

⁴² The French Civil Code available at: <http://www.legifrance.gouv.fr/> ;

According to the French regulation, the patrimony by appropriation has the same significance as in the Romanian law, representing a juridical universality.

On the other hand, even in the current Romanian legal framework, the law stipulates the possibility to alienate a patrimony by appropriation as juridical universality, the alienation of patrimonies by appropriation and fiduciary mass being allowed by documents *inter vivos*.

The first legislation breach in this respect has been made as regards the reorganization of legal persons, respectively companies allowed to restructure their activities through merger and division. Without discussing about merger and total division of a company to transfer the entire patrimony of the company whose existence will cease following the merger or division, we cannot exclude from these examples the alienation documents *inter vivos* of patrimony units, as juridical universalities, the situation regarding the partial division of companies which remain in existence after this juridical operation⁴³.

According to the law, the partial division of a company is made by the universal transfer of a unit from the legal person's patrimony to the patrimony of an existing legal person or newly-created following the division (art. 250¹ of Law no. 31/1990 on companies).

In the same respect there are the provisions of art 236, paragraph (3) of the Civil Code and art 237, paragraph (2) of the Civil Code regarding the partial division of the legal person, operation consisting of the dismemberment of a part of a legal person's patrimony and the transfer of this part, with universal title, to one or several legal persons existing or incorporated as such.

Returning to the alienation of patrimonies by appropriation by *inter vivos*, we will refer to art 791 of the Civil Code, which regulates the transfer of the fiduciary patrimony from the fiduciary assignor to the beneficiary, as effect of the termination of the fiduciary contract. Under such circumstances, the fiduciary patrimony changes its holder in relation to whose patrimony it keeps its special features, remaining in existence as universality until the payment of all fiduciary debts⁴⁴.

⁴³In this sense, Gheorghe Beleiu, *Drept civil român, Introducere în dreptul civil. Subiectele dreptului civil*, Casa de editura și presa "Șansa", Bucharest, 1993, pp. 403 – 415; Corneliu Bîrsan, *Drept civil. Drepturi reale principale*, 2013, op. cit., p.17;

⁴⁴Baias, Chelaru, Constantinovici, Macovei, op.cit., p. 836.

Also, based documents *inter vivos*, the patrimonies by appropriation of several professionals can be alienated, respectively doctors (art 69, paragraph 2 of Law no. 95/2006 on the health reform⁴⁵), lawyers (art 198, paragraph (4) of the 2011 Statute of the lawyer profession⁴⁶), insolvency practitioners (art 22, paragraph (6) of E.G.O. no. 86/2006 on the organization and activity of insolvency practitioners⁴⁷), etc.

Thus, the forms of lawyer practice can transform into any other form of practice stipulated by the law, without liquidation, separately or along with the reorganization of the lawyer practice through merger, absorption, total or partial division, respectively through the dismemberment of a part of the professional patrimony by appropriation as recorded in the accounting records of the form of practice subject to partial division.

Moreover, lawyers can contribute to the form of practice following transformation with a share of the professional patrimony by appropriation, as recorded in the financial-accounting records of the transformed form of practice and, they will prepare, to this end, the financial-accounting documents for the transfer to the selected form of practice (art 182, paragraphs (3) and (4) of the 2011 Statute of the lawyer profession)⁴⁸.

Therefore, the professional patrimony by appropriation of lawyers can be alienated by documents *inter vivos* and the only temporary impediment concerns the publicity of the transfer deed at the Electronic Registry of lawyers' patrimonies by appropriation⁴⁹, which does not exist at present.

⁴⁵Law no. 95/2006 on the health reform published in the Official Gazette of Romania, Part I no. 372/28 April 2006, as further amended and supplemented;

⁴⁶Statute of the lawyer profession as of December 3, 2011 published in the Official Gazette of Romania, Part I no. 898/19.12.2011, as further amended and supplemented;

⁴⁷E.G.O. no. 86/2006 on the organization of the practice of insolvency practitioners, published in the Official Gazette of Romania, Part I no. 944/22.11.2006, republished in the OGoR, Part I no. 327/May 18, 2010, as further amended and supplemented;

⁴⁸In the same respect there are the special provisions stipulating the legal regime of each for of lawyer practice (art. 192, paragraph (1), art 196, paragraph (1), art. 198, paragraph (2) – (4), art 199, paragraph (2) – (3) of the 2011 Statute of the lawyer profession;

⁴⁹The electronic registry of the lawyer patrimony by appropriation is stipulated by art 180, paragraph (3) of the 2011 Statute of the lawyer profession as amended under the Decision of U.N.B.R. no. 852/2013, republished in the Official Gazette, Part I no. 33/16.01.2014; The registration with the Electronic registry of the patrimony by appropriation is opposable to third parties.

Similarly, there is regulated the possibility to transfer (alienate) the professional patrimony by appropriation of the insolvency practitioners' forms of practice.⁵⁰

In terms of the topic analyzed hereby, the provisions of the law as regards the alienation of the professional patrimonies by appropriation of family doctors are extremely interesting.

The practice of a family doctor comprises the professional patrimony by appropriation, the infrastructure of the office in their property or use, and the clients. The doctor's practice can be alienated by alienating the professional patrimony by appropriation, the takeover of practice from other family doctor if the latter ceases their activity and this is done through the transfer of the professional patrimony by appropriation to the doctor who takes over the practice (art 69, paragraph (3) of Law no. 95/2006).

The law allows for the alienation of the professional patrimony by appropriation of family doctors to take place based on documents *inter vivos*, with onerous title or free of charge and expressly stipulates the legal documents which can deal with the professional patrimony by appropriation. According to provisions of art 5 of the Order of Public Health Ministry no. 1322/November 2, 2006⁵¹, *the object of taking over a practice is the professional patrimony by appropriation and the takeover means can be: sale, exchange, donation, will, rental, commodate, usufruct, share capital contribution*. To perform this legal operation, the special legal stipulation provides special means to make the publicity of the practice's takeover.

The general publicity of the transfer of the professional patrimony by appropriation of family doctors is made both by the doctor-assignor, through specific procedures, and by the new holders, by communicating the deed of transfer to territorial public health authorities, to the agency of health insurances and patients.

It is obvious that there is not justified the strong doctrinaire reserve regarding the possibility to alienate, based on documents *inter vivos*, the patrimony by appropriation, as juridical universality because this possibility is a juridical reality.

⁵⁰Considering the provisions of art 22 of E.G.O. no. 86/2006

⁵¹Order of Public Health Ministry no. 1322/November 2, 2006 on the approval of the norms to set the criteria and methodology regarding the takeover of an existing practice, published in the Official Gazette, Part I no. 929/16.11.2006.

In our opinion the alienation, based on documents *inter vivos*, of the patrimony by appropriation of the merchant – natural person is possible, although complicated, even in the current legal framework.

The issues of such transfer are mainly generated by the obligations of the patrimony by appropriation and the right to pursue of professional creditors. However, the rights of the creditors are not affected by the alienation of the patrimony by appropriation, as they relate to the patrimony and not to its owner. Also, the unlimited nature of the secondary liability of the assignor merchant remains untouchable. It is beyond discussion that the alienation of the patrimony by appropriation cannot generate a change in the rights of professional creditors nor the transfer of unlimited responsibility from the assignor to the assignee. However, we do not exclude the possibility for the assignee to take over this obligation of the assignor under the alienation agreement.

The alienation of the patrimony by appropriation of the merchant – natural person involves the conclusion of the legal document of alienation in compliance with the legal conditions as regards the validity and opposability of all legal operations comprised by this complicated legal document: sale, assignment of receivables, debt takeover, contract assignment, etc.

According to the contents of the patrimony by appropriation and the legal operations involved by its transfer, the deed of transfer will be a document under private signature or a notarized document.

As regards the publicity and opposability to third parties of the deed of transfer for the patrimony by appropriation, it is required to make a registration with the trade registry, to register it with the land book whenever the goods of the patrimony by appropriation include real estate, movable securities and/or other rights, deeds or legal relations related to the real estate properties registered with the land book and the registration with the electronic archive of movable securities, given that the assignment of a universality of receivables is involved (art 1579 of the Civil Code).

Also, related to the opposability of receivable assignment to debtors, it is required to send the deed of transfer to all the assignor's debtors⁵² (art. 1579 of the Civil Code) and for the acceptance of contract assignment, the deed of transfer is sent to co-contractors in order to enforce the provisions of art 1315, paragraph (1) of the Civil Code.

⁵²Including the guarantors of the assignor's debtors as per the provisions of art 1581 of the Civil Code

Beyond these last considerations, as regards the efficient management of the patrimony by appropriation, the lawmaker should enact express stipulations on the transfer between live persons of the patrimony by appropriation of the merchant – natural person.

5. Conclusions

The modern economic theory considers that the economic development starts from the stimulation, on large scale, of the activity of individual entrepreneurs.⁵³

The establishment of a patrimony by appropriation for economic activities can be the ideal tool to manage the patrimony, to limit the responsibility and to protect the personal patrimony of merchants.

The comparative analysis of the legal regime of the merchant-natural person's patrimony by appropriation to those of fiduciary units established by merchants – legal persons and, in particular, to the professional patrimonies by appropriation, reveals significant differences as regards the protection offered to the personal patrimony of certified professionals, to the full autonomy of their special patrimonies.

It is clear that the limitation of liability and, implicitly, of the risk undertaken by the individual merchant, is an issue for which the Romanian law hasn't enacted the most proper solution.

The separation of patrimonies of the merchant – natural person (of the patrimony by appropriation compared to the personal one) is imperfect and the merchant cannot protect their personal patrimony from the pursuit of professional creditors.

We believe that the juridical fragility of the merchants – natural persons, whose professional bankruptcy can mean their ruin and that of their family, independently of the objective reasons of such bankruptcy, requires the change of ideas regarding their liability for professional obligations.

In this respect, there is necessary to generalize the principle of full autonomy of the patrimonies by appropriation, between themselves and compared to the personal patrimony of any entrepreneur by including in the

⁵³ Heywood Fleisig, Mehrnaz Safavian, Nuria de la Pena, *Reforming Collateral Laws to Expand Access to Finance*, The World Bank, Washington DC, 2006, p. 24-26, available at: <http://www.ceal.org/publications.asp>., Apud Radu Rizoii, op.cit.

area of enforcement of such principle, the patrimonies by appropriation of merchants – natural persons.

The effects of “proofing”, of the full autonomy of special patrimonies of the merchant – natural person could strengthen the function of business tool of the patrimony by appropriation by protecting the personal patrimony of the merchant related to the risks inherent to the economic activities and through the creation of circumstances to regulate the right of the merchant to alienate, at any time, by documents inter vivos, their patrimony by appropriation.

Given that the use of the patrimony by appropriation as tool in making business cannot be designed without the possibility to alienate it by documents inter vivos, the Romanian law should, based on a specific means, allow merchants such alienation, having as reference the regulations on the alienation of professional patrimonies by appropriation and the models offered by other European legislations.