# LESSON 2: ENTREPRENEURS AND ENTERPRISES

**SUMMARY:**

1.- Entrepreneurs
a) Acquisition of the legal status of entrepreneur
b) Registration in the Trade Register
c) Liabilities
2.- Entrepreneurs' collaborators
a) General delimitations
b) Dependent collaborators: employees
c) Independent collaborators

## 1-. Entrepreneurs

### *a) Acquisition of the legal status of entrepreneur*

1.-REQUIREMENTS

From a legal perspective, entrepreneurs are considered to be natural or legal persons who, professionally and on their own account, organize the materials and human resources required to supply goods and services to the market. Art. 1 of the Cdc uses the term "merchant" to refer to this type of natural or legal person. Nevertheless, this term can be considered inappropriate because current entrepreneurs perform not only commercial activities but also industrial activities. Apart from that, the most important feature of entrepreneurs is that they perform their economic activity inside an enterprise.

When a legal or natural person is legally considered to be an entrepreneur, a special legal status is applied. Nevertheless, the Cdc has not clearly defined which kind of legal or natural persons can be considered to be entrepreneurs. In the Cdc there is still no clear legal definition for entrepreneurs nor a legal distinction between small, medium or large enterprises or an updated catalogue of legal and natural persons subject to Commercial Law.

Traditionally, certain legal or natural persons performing economic activities have been excluded from Commercial Law. These include:

a) *Craftspeople* who perform an economic activity on their own account, but without taking part in an enterprise. They supply goods using their own workforce and family members.

b) *Farmers*. Agricultural and breeding activities do not fall within the scope of the Cdc. They were excluded since they were considered to ensure the people's survival, rather than being commercial activities. Apart from that, both activities were subject to risks which made it impossible to make a business plan. Nowadays, activities consisting of processing agricultural or livestock

products are considered to be included in Commercial Law. Nevertheless, public and private LLCs devoted to agricultural and breeding activities are always considered to be entrepreneurs.

c) *Professionals*. Traditionally, professionals have not been regulated by Commercial Law because their professional activity was not considered to consist of delivering goods or services to the market. Professionals performed an activity that required a personal qualification as a way of ensuring their own livelihoods but without a speculative purpose. At present, professionals are, nevertheless, organized and perform their professional activities as if they are actual entrepreneurs.

Article 1 of the Cdc sets out the requirements that must be met in order to legally be considered an entrepreneur:

A) In the case of LEGAL PERSONS, they are considered to be entrepreneurs when they have been incorporated according to the rules provided by Commercial Law.

B) In the case of NATURAL PERSONS, the Cdc requires that:

> 1-.Natural persons must have legal capacity to perform commercial activities. In order to have legal capacity, natural persons must: a) be aged over eighteen; and b) have free disposal of their own assets (i.e. they have not been declared legally unfit).
>
> As an exception, the Cdc allows legally unfit persons and natural persons aged under eighteen to perform commercial activities when they have inherited their parents' or predecessor's business. In that case, the commercial activity must be performed under the supervision of a legal guardian. The legal guardian has to register the entrepreneur in the Trade Register, providing the information required for the first registration, together with all the information related to the entrepreneur's legal guardian and parents or predecessor.
>
> Entrepreneurs who have been declared legally unfit are also allowed to continue with their commercial activities under the supervision of a legal guardian.
>
> 2.-Natural persons must perform their commercial activity constantly and professionally or, as the Cdc states, habitually. This commercial activity is assumed to be habitual when the entrepreneur advertises it through newspapers, advertisements or shop signs.

The definition of entrepreneur provided by article 1 of the Cdc is not complete. Two requirements need to be added:

> 1.-In the first place, entrepreneurs must perform their commercial activity on their own account. They must assume the rights, obligations and liabilities of the legal relationships which they enter into.

2.-In the second place, the commercial activity must involve an organization of materials and human resources with the purpose of supplying goods and services to the market. The commercial activity must, therefore, be performed in the context of an enterprise.

## 2.- PROHIBITIONS, INCOMPATIBILITIES AND DISQUALIFICATIONS

Certain natural persons with legal capacity are not allowed to professionally perform commercial activities on their own account or hold the office of company director because they incur in a legal incompatibility or prohibition.

### Prohibitions

Certain natural persons who are able to create unfair competition to other entrepreneurs are not allowed to perform commercial activities on their own account or hold the office of company director. These natural persons are:

- A general (industrial or capital) partner
- The general manager of a company
- A ship's captain
- The directors of a company

### Incompatibilities

Certain natural persons have an incompatibility to perform commercial activities as a way of protecting the general interests connected to the office they hold or the profession they have. These incompatibilities try to avoid the use of preferential information obtained from the office held by a natural person or from their profession in order to pursue a particular benefit inside an enterprise. These incompatibilities have different scopes depending on the type of office or profession affected by the incompatibility (arts. 13 and 14 Cdc):

- *Absolute incompatibility*. People affected by an absolute incompatibility cannot perform commercial activities in Spain. This incompatibility affects the members of the Government, military and the highest-ranking officials in the State administration.

- *Relative incompatibility*. People affected by a relative incompatibility cannot perform commercial activities in certain regions, provinces and municipalities. This incompatibility affects judges, prosecutors, Government representatives, etc.

### Disqualifications

Insolvency Act 22/ 2003, of 9 July. (*Ley 22/2003, de 9 de julio, Concursal*), has introduced a new regulation on entrepreneurial insolvency. From now on, the declaration of insolvency does not prevent entrepreneurs from continuing their commercial activity. The Act only provides a temporary disqualification which can last from five to twenty years in case they negligently caused the insolvency. Commercial activities performed in breach of the disqualification will be rendered null and void.

### *B) Registration in the Trade Register*

#### 1.-CONCEPT OF TRADE REGISTER

Entrepreneurs have to inform third parties of the commercial activity that they perform, certain personal and legal circumstances and any other relevant information as a way of ensuring the legal certainty which the course of trade requires. This knowledge about the entrepreneurs and their activity can be obtained through different means, but especially through the Trade Register. *The Trade Register can be defined as an administrative institution aimed at officially advertising entrepreneurs and certain legal circumstances related to them and other functions assigned by Law.* The Trade Register is regulated in arts. 16 to 24 of the Royal Decree 1784/96, of 19 July, which approves the text of the Trade Register Regulations (RRM hereinafter).

According to this, the Trade Register's main function is to be a legal advertising instrument for entrepreneurs (natural or legal persons) and the legal situations or events related to them. Together with this advertising function, the Trade Register has other functions assigned, depending on the type of Trade Register.

#### 2.-ORGANIZATION AND FUNCTIONING OF THE TRADE REGISTER

The Trade Register is organized in different *territorial Trade Registers*, which are located in the capital of each province, and a *central Trade Register*, which is located in Madrid. All of them depend on the Ministry of Justice and, within the Ministry, on the General Directorate of Registers and Notaries (DGRN).

<u>Functions of the territorial Trade Register</u>

Together with the advertising function, the territorial Trade Register has other functions assigned:

1-. The legal approval required for the books of companies or individual entrepreneurs.

2-. The appointment of independent experts to evaluate the non-monetary contributions in public LLCs and partnerships limited by shares and the appointment of auditors in those cases established by law.

3-. The deposit and publication of the annual accounts of corporations and groups of companies.

Entrepreneurs must be registered in the Trade Register in the location of their registered address. The same criteria is used in the case of the approval required for the books of companies or individual entrepreneurs and the appointment of independent experts and auditors.

Functions of the central Trade Register

1.- The central Trade Register gathers all the information registered in each territorial Trade Register and, for this purpose, each territorial Trade Register must send an extract of its registry entries to the central Trade Register. Regarding this information, the central Trade Register cannot issue certifications. It can only issue a non-certified extract for informative purposes.

2-. The central Trade Register publishes the BORME (its Official Gazette) daily. The BORME enables third parties to know the content of the Register. In the same way, the registered information has effects on third parties once it has been published in the BORME.

3.- The central Trade Register is also in charge of the registered company names section. The main function of the central Trade Register in this field is to control the company names that will be registered in order to avoid the registry of two different companies with the same name. For this purpose, companies have to request the central Trade Register to issue a negative company name certificate before their incorporation. This is the only certification which the central Trade Register can issue.

## 3.- REGISTRATION PROCEDURE

Persons and legal situations to be registered

- The legal and natural persons that can be registered are: individual entrepreneurs, companies, credit institutions, insurance companies, mutual guarantee companies, economic interest groups and collective investment institutions. Other types of entities which are not legal persons such as pension funds or branch offices are also subject to registration.

- The legal situations which can be registered are judicial declarations on the legal capacity of the entrepreneur, the marital property

regime, the power of attorneys granted by the entrepreneur, insolvency situations, etc.

Submission of documents. The registration must be requested by people who are interested in it. Nevertheless, any person submitting the documents can be considered to be a proxy of the person who has the power or obligation to submit them, as a way of facilitating the registration.

Documents to be submitted. The registration is entered by submitting a public deed in which the legal situation to be registered is recorded.

Procedure. After submitting the public deed, the Register issues a receipt which states the type of documents received and the date and time in which they were submitted. The Register also enters in the logbook the filing entry. The date of the filing entry is required because, if the information is finally registered, the date of the registration entry will be the date of the filing entry. If there are two registrations with the same date, the priority will be determined according to the time of the filing entry.

The registrar must review the documents submitted and decide if they comply with all the legal requirements for registration. After reviewing the documents, the registrar can enter the registration if the legal requirements are fulfilled. The registration can also be suspended or rejected. In these cases, the Registrar must indicate the reasons why the registration has been rejected or suspended.

Registry entries.

- Filing entry. This is entered after the submission of the documents and determines the beginning of the registration procedure.

- Registration entry. This is the main entry.

- Preventive annotations. This entry informs about a future change in the registered information as a consequence of an administrative or judicial proceeding.

- Cancellation entry. This is an entry with a negative content which invalidates previous registrations.

## 4.- PRINCIPLES ON WHICH THE TRADE REGISTER IS BASED

- **Individual sheet principle.** The Trade Register is organized according to the legal or natural persons to be registered. Each entrepreneur has an individual sheet where the legal situations related to it are registered (art. 3 RRM).

- **Mandatory registration principle.** The registration is mandatory for companies and shipowners. The registration is

voluntary for individual entrepreneurs but, if they decide not to register, they will not be able to register any other legal situation related to them (art. 4 RRM).

- **Public deed principle.** The registration can only be entered by submitting a public deed (art. 5 RRM).

- **Priority principle.** The registration will be entered according to the date and time in which the public deed is submitted for registration (art. 10 RRM).

- **Consecutive registration principle.** This means that the registration of legal situations, acts or contracts related to an entrepreneur requires the previous registration of the entrepreneur itself. Each registered entry is the consequence of a previous one and the cause of the following one (art. 11 RRM).

- **Legality principle.** According to this principle, no legal situation can be registered without complying with all the legal provisions. For this purpose, the registrar examines the submitted documents, their legal form, their content and the legal capacity and authentication of the acting parties to ensure that all the legal requirements are met (art. 6 RRM).

- **Authentication principle**. Once the legal act, situation or contract is registered, it is assumed *iuris tantum* to be valid and accurate until a judicial declaration of nullity or inaccuracy is registered. The registration helps to advertise the legal act, situation or contract related to an entrepreneur which has been registered, but does not affect the act or situation or the content of the contract itself. They all legally exist whether or not they have been registered. The registration only determines the way in which the legal act, situation or contract will affect third parties. There is only one exception to this rule. The registration of public and limited LLCs and partnerships limited by shares has a constitutive effect. This means that a public or limited LLC or a partnership limited by shares legally exists once it has been registered. Without registration, there is no public or limited LLC. There is only an irregular company (art. 7 RRM).

- **Attestation principle**: The declaration of nullity or inaccuracy of the entries in the Trade Register does not damage the rights of third parties acquired in good faith in accordance with the law (art. 8 RRM).

- **Formal advertising principle**. The Trade Register is public. As a consequence, any person can ask for the information registered therein. The formal advertising is achieved through

the issue of certificates and non-certified extracts for information purposes and through the BORME (art. 12 RRM).

- **Substantive advertising principle.** This principle is related to the effects that the registration has vis-à-vis bona fide third parties and the consequences of the non-registration. According to this, the substantive advertising principle has a positive and a negative nature:

  -Positive nature. All the legal acts, situations, and contracts registered are *iuris et de iure* and it is assumed that they are known by everyone and, as a consequence, everyone can be affected by them, both to their benefit or to their detriment. The registered information affects bona fide third parties from the moment at which that information is published in the BORME. If the third party proves that it was unable by any means to know the information registered and published in the BORME, that information will not affect it after 15 days have elapsed since the publication in the BORME. If there is a contradiction between the registered and published information, the published information prevails (art. 9 RRM).

  - Negative nature. All the legal situations, acts or contracts subject to registration but not registered will have effects between the parties which have been involved in them but not vis-à-vis bona fide third parties (art. 4.2 RRM).

*c) Liabilities*

1.-GROUNDS FOR LIABILITY

Entrepreneurs are liable for:

1.-Breach of their contractual obligations with willful misconduct or negligence, causing damages to the other party in an agreement. In these cases, entrepreneurs can only be exonerated of their liability when the breach of their contractual obligations is due to unforeseeable causes or force majeure. *This is a contractual liability*.

2.-Damages caused to third parties for unlawful actions or omissions carried out with willful misconduct or negligence. This is an *extra-contractual liability* because there is no contractual agreement between the entrepreneur and the third party who suffered the damage.

3.-Actions or omissions carried out by their collaborators within the scope of their power of attorney.

## 2.-CRITERION FOR ATTRIBUTING LIABILITY

Spanish liability legislation is based on the general principle of fault-based liability. This means that someone is considered liable for damages when those damages have been caused by a negligent action. Regarding the entrepreneur's liability, nevertheless, there is a tendency towards considering it as an objective liability. There are many cases in which entrepreneurs are liable for damages whether or not they have carried out a negligent action. The mere performance of a commercial activity pursuing a benefit involves a risky situation which the entrepreneur should be liable for.

This new tendency is shown by the regulations on carrier's liability, nuclear power enterprises, consumer protection, etc.

## *3.-ASSETS REQUIRED FOR MEETING THE DEBTS INCURRED BY ENTREPRENEURS*

Entrepreneurs must meet their obligations with all their present and future assets (art. 1911 Cc). This means that entrepreneurs, whether legal or natural persons, must meet their obligations with the assets assigned to the business and their own assets. There is no distinction between civil or mercantile assets in terms of liability.

## *4.-COMMERCIAL ACTIVITIES PERFORMED BY MARRIED ENTREPRENEURS*

The Cdc regulates the way in which the own assets of the spouse who is not an entrepreneur can be affected by the commercial activity carried out by the other spouse who is an entrepreneur. In the first place, the Cdc states that both spouses should agree by establishing in the marriage contract the effects of performing commercial activities on the marital property and on the assets of the spouse who is not an entrepreneur.

When there is no marriage contract signed, the following rules will be applied (arts. 6 to 12 Cdc):

1-.The marital property resulting from the commercial activity performed by the spouse who is an entrepreneur will be subject to the payment of the entrepreneur's debts.

2.-The own assets of the spouse who is an entrepreneur will be subject to the payment of the debts resulting from the commercial activity carried out by that spouse.

3.-The marital property which does not result from the commercial activity will be subject to the payment of the entrepreneur's debts if both spouses accept this. The acceptance may be express or assumed. The Cdc assumes that the acceptance has been given:

- When the commercial activity has been carried out with the knowledge of the spouse who is not an entrepreneur and without opposing this.

- When the entrepreneur who carried out a commercial activity before and after the marriage continues with it without an express opposition of the spouse who is not an entrepreneur.

Both assumptions do not work when the spouse who is not an entrepreneur opposes this through a formal declaration. This formal declaration will be effective vis-à-vis third parties if it is recorded in a public deed and registered in the Trade Register.

4.-The own assets of the spouse who is not an entrepreneur will be subject to the payment of the entrepreneur's debts if the spouse expressly accepts this.

5-. The spouse who is not an entrepreneur can revoke his/her express or assumed consent at any time. The revocation will be registered in the Trade Register if the express consent was previously registered. If the consent was not registered or it was assumed, the revocation may be proved by other means but a public deed should be used.

## 2.- Entrepreneurs' collaborators

### *a) General delimitations*

Entrepreneurs need collaborators who directly or indirectly help them to perform their commercial activity, consisting of supplying goods or services to the market. The entrepreneurs' collaborators can be classified into two different groups according to article 281 and subsequent of the Cdc.

- *Dependent collaborators*. They help entrepreneurs to perform their activity permanently as part of the enterprise. They are bound to the entrepreneur through an employment contract and, therefore, they are considered to be employees and subject to a hierarchical relationship with the employer.

- *Independent collaborators*. These collaborators help entrepreneurs to introduce their services or products into the market by promoting relationships with clients. They are not considered to be part of the enterprise. Independent collaborators are entrepreneurs themselves

who perform a commercial activity on their own account, without being subject to a subordination relationship with the party who engages their services. Independent collaborators are bound to the entrepreneur through a mediation, agency or commission contract.

*b) Dependent collaborators: employees*

1.-GENERAL MANAGER (WITH GENERAL POWER OF ATTORNEY)

A general manager is a general representative who can act on behalf of the entrepreneur in all matters related to the commercial activity performed by him. The Cdc focuses on his power of attorney.

1-. A general manager needs a power of attorney which covers all matters related to the commercial activity performed by the entrepreneur. His power of attorney can be limited to meeting two different conditions. In the first place, the limitations cannot lead the general manager to lose his status as the general representative. In the second place, these limitations can only be effective within the relationship between the entrepreneur and his general manager, but they will not be effective vis-à-vis third parties. General managers can also act on behalf of the entrepreneur in matters far beyond its commercial activity if empowered to do so (sell property, establish of branches, etc.)

2.- The general manager is granted with the power of attorney by signing the employment contract.

3-. The general manager acts on behalf of the entrepreneur and this fact needs to be expressly stated in every relationship that the general manager enters into (direct *contemplatio domini*). In this way, the entrepreneur will assume all the rights, obligations and liabilities resulting from the relationships entered into by the general manager.

4-. In the event that the general manager does not state that he is acting on behalf of the entrepreneur, the general manager himself will be bound to third parties and will assume all the rights, obligations and liabilities resulting from the relationships entered into by him. There is one exception to this general rule: when the general manager is considered to have a de facto power of attorney. This is a general manager who obviously belongs to a well-known firm, but does not have a power of attorney registered in the Trade Register and has not stated in the relationship entered into by him that he acts on behalf of the entrepreneur. Taking into account the concept of a general manager with de facto power of attorney, the Cdc assumes that, in all the relationships entered into by him which are related to the commercial activity performed by the entrepreneur, the general manager with de facto power of attorney has acted on behalf of the entrepreneur although he has not stated this fact expressly in the relationship. As a result, the entrepreneur will be directly bound to the third party.

5.- General managers cannot compete with the entrepreneur. They cannot perform, on their own account or on behalf of another person, similar commercial activities to the ones performed by the entrepreneur, unless he is enabled to do so. This prohibition to compete can continue to be effective until two years after the end of the employment contract, when the entrepreneur shows a special interest in this, and the general manager is financially compensated.

6-. All the fines imposed for administrative or fiscal offences will be paid by the entrepreneur if they result from the general manager's handling of matters concerning the commercial activity of the entrepreneur. After paying the fine, the entrepreneur can claim the general manager for damages by proving negligent misconduct.

7.-The power of attorney can only be extinguished by express cancellation from the entrepreneur. The entrepreneur's death does not extinguish the power of attorney itself. The cancellation must be registered in order to be effective in relation to third parties. In the case of general managers with a de facto power of attorney, the cancellation will be effective when all the company's clients are informed of this.

2.- Dependent collaborators with a LIMITED POWER OF ATTORNEY (unique proxies)

The Cdc defines this type of collaborators according to their limited power of attorney. They are only entitled to deal with certain matters related to the commercial activity performed by the entrepreneur. The Cdc states that the entrepreneur will only assume the rights, obligations and liabilities resulting from relationships entered into by this type of dependent collaborator when those relationships are related to the matters included in their power of attorney.

There are different types of dependent collaborators with limited powers of attorney, depending on the commercial activity performed by the entrepreneur. As a general rule, the Cdc distinguishes two different types:

- *Sales assistants (dependientes de comercio)*. A sales assistant is in charge of selling, collecting the money, issuing the receipt and receiving the goods delivered to the entrepreneur. They are not allowed to finance purchases or receive the money outside the commercial establishment where they work.

- *Sales representatives (representantes de comercio).*They collaborate with the entrepreneur by attracting new customers and expanding his commercial activity inside and outside the place where the commercial establishment is located. Sales representatives carry out this activity being part of the enterprise as employees.

*c) Independent collaborators*

1-.SALES AGENTS. Sales agents are regulated by Act 12/92, of 27 May, on Agency Contracts (*Ley 12/92, de 27 de mayo sobre el Contrato de Agencia*). The law defines a sales agent as an entrepreneur, whether a natural or legal person, who permanently and upon remuneration promotes or enters into commercial relationships with third parties on behalf of the entrepreneur.

2.- COMMISSION AGENTS OR MEDIATORS. They are independent collaborators who sporadically help entrepreneurs in different ways. Commission agents enter into relationships with third parties on behalf of the entrepreneur, whereas mediators help entrepreneurs by bringing them together with third parties, but without entering into legal relationships.

## 3.- Vocabulary

**Entrepreneur**- Empresario

**Merchant**- Comerciante

**Craftspeople**- Artesanos

**Legally unfit persons**- Discapacitados

**Legal guardian**- Tutor legal

**To perform a commercial activity on one´s account**-Desarrollar actividades empresariales por cuenta propia

**To incur in a legal incompatibilityor prohibition**- Incurrir en incompatibilidad o prohibición legal

**To create unfair competition**- Crear competencia desleal

**Disqualification**- Inhabilitación

**Trade Register**- Registro Mercantil

**Central Trade Register**- Registro Mercantil Central

**Territorial Trade Register**- Registro Mercantil Territorial

**Legal approval for the books**- Legalización de los libros

**Registry entry**- Asiento registral

**To enter a registration**- Inscribir

**Logbook**- Libro diario

**Filing entry**- Asiento de presentación.

**Registration entry**- Asiento de inscripción.

**Preventive annotations**- Anotaciones preventivas

**Cancellation entry**- Asiento de cancelación.

**Certifications**- Certificaciones registrales

**Non certified extract for informative purposes**- Notas simples informativas

**Registered company names section**- Sección de denominaciones sociales

**Negative company name certification**- Certificación de denominación social negativa

**Credit institutions**- Entidades de crédito

**Insurance companies**- Compañías de seguros

**Mutual guarantee companies**- Sociedades de garantía recíproca

**Economic interest groups**- Asociaciones de interes económico

**Collective investment institutions**- Instituciones de inversion colectiva

**Individual sheet principle**- Principio de hoja personal

**Mandatory registration principle**- Principio de inscripción obligatoria

**Public deed principle**- Principio de titulación pública

**Priority principle**- Principio de prioridad

**Consecutive registration principle-** Principio de tracto sucesivo

**Legality principle**- Principio de legalidad

**Authentication principle**- principio de legitimación

**Attestation principle**- Principio de fe pública

**Formal advertising principle**- Principio de publicidad formal

**Substantive advertising principle**.- principio de publicidad material

**Willful misconduct**- Dolo

**Negligent misconduct**- Negligencia

**Unforseeable causes or force majeure**- Causa fortuita o fuerza mayor

**Spouse**- Cónyuge

**Marriage contract**- Capitulaciones matrimoniales

**Marital property-** Bienes adquiridos durante el matrimonio

**The own assets of each spouse**- Bienes privativos de cada cónyuge

**Entrepreneur collaborators**- Colaboradores del empresario

**Dependent collaborators**- Colaboradores dependientes

**Independent collaborators**- Colaboradores independientes

**Mediation contract**- Contrato de mediación

**Agency contract**- Contrato de agencia

**Commission contract**- Contrato de commission

**General manager**- Factor, gerente de una empresa

**Power of attorney**- Poder de representación

**General manager with de facto power or attorney**- Factor notorio

**Sales assistant**- Dependiente de comercio

**Sales representative**- Representante de comercio

**Sales agent**- Agente

**Commission agent**- Comisionista

**Mediator-** Mediador