



General Assembly

Distr.: Limited
9 September 2014

Original: English/French

**United Nations Commission
on International Trade Law**
Working Group I (MSMEs)
Twenty-third session
Vienna, 17-21 November 2014

Possible Alternative Legislative Models for Micro and Small Businesses

Submissions from Italy and France

Note by the Secretariat

At the twenty-second session of Working Group I (10-14 February 2014), reference was made to several domestic legislative models applicable to micro and small businesses that provided for the segregation of business assets without requiring the creation of an entity with legal personality that offered limited liability protection (see A/CN.9/800, para. 46). Relevant delegations agreed to submit to the Working Group documents presenting distinctive features of those models with a view to facilitating the understanding of the Working Group in respect of how such features could provide alternative forms of organization for micro and small businesses.

In response to that request, the Governments of Italy and France have submitted to the Secretariat of the United Nations Commission on International Trade Law (UNCITRAL) the following materials in order to provide the Working Group with additional information for its deliberations. The materials provided are reproduced as an annex to this note in the form in which they were received by the Secretariat, with formatting changes.



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Annex

I. Italy

[Original: English]

[7 July 2014]

A. Introduction

1. At its twenty-second session in February 2014, Working Group I considered business models alternative to the creation of a limited liability company providing for the segregation of business assets without requiring the creation of an entity with legal personality and limited liability. Within this context, Italy hereby submits a brief description of two legal schemes under its legal system intended to facilitate the performance of economic activities either individually or jointly: (i) constitution of a separate fund dedicated to specific business activities, to be used by sole or multiparty business entities, as well as by individuals or companies according to the type of fund, and (ii) business network contracts, permitting the organization of cooperation among firms with high flexibility and based on contract law instead of company rules.

B. Separate capital fund

2. Under the Italian civil code, debtors respond to their obligations with all their present and future assets. Limitation of liability is only permitted in cases established by law (Article 2740). However, separate funds can be established for a specific purpose, in which case, the funds are specifically devoted to the satisfaction of claims related to the activities carried on to execute the relevant purpose. One kind of separate fund is regulated by Article 167, according to which an individual, or either or both spouses can establish a capital fund (*fondo patrimoniale*) including identified movable and/or immovable assets, which are allocated to the satisfaction of family needs. In this way, the fund is separated from any other assets of the settlor used for business or other matters. In case of insolvency of the settlor, the capital fund is protected. The limit of this institution is that it is conditional upon the existence of a family (since it was not conceived as a tool for businesses, and it can also be established by non-entrepreneurs).

3. Since 2003, corporations can establish capital funds (each) devoted to a specific purpose, or agree that the earnings of an activity be dedicated to repayment of loans obtained for the execution of those activities (Article 2447 bis).¹ The establishment of such a fund is subject to a number of limitations, in particular that it cannot exceed 10 per cent of the equity of the relevant company. Moreover, the company's decision to constitute a fund must clearly state the activities for whose purpose the fund is constituted, the goods included in the fund and a financial plan showing the adequacy of the fund to execute the expected activities. This decision must be made public by way of its registration in the Business Registry, opposition to which may be raised by existing creditors of the company. Once constituted, the capital fund is segregated from other funds of the company and serves only to satisfy claims arising from the relevant activities.

¹ Extension of such provision to limited liability companies is usually excluded by legal scholars.

4. In 2006, an amendment to the Italian civil code was introduced making the category of separate funds of a more general nature: according to Article 2645 ter, immovable or registered movable goods can be devoted to a specific purpose to the benefit of a natural or legal person, a public administrative body or other entity as long as it is done by public deed and registered. Once constituted, such a fund is segregated from any other assets of the person or entity. Since this provision states that separate funds can be established for any legitimate interest (*interessi meritevoli di tutela*), this has been read as permitting the use of such instrument for any kind of legitimate business purpose. However, most legal scholars read the provision as prohibiting the establishment of a separate fund exclusively for the benefit of the settlor.² This implies that a sole entrepreneur would not be permitted to segregate funds to its business activities unless those activities are jointly performed, or a new legal entity is constituted. This in turn implies that only limited companies would be permitted to establish separate funds without the parallel establishment of a separate legal entity.

5. The situation is different in the case of joint business activities. In the case of consortia with external activities,³ Article 2614 of the civil code permits the constitution of a fund composed of contributions by the members, that can only be used to satisfy claims related to the activities of the consortium itself (*fondo consortile*). This is thus protected from claims of individual members' creditors as long as the claim relates to the activities of the consortium. This applies although the consortium has no legal personality.

6. Finally, separate funds are also permissible for business network contracts, as described in the following section.

7. Separate funds are not common, are subject to a number of limitations and are restrictively applied as an exception to the general principle that liability of a person extends to all its assets. However, the designation of a fund for a specific purpose has now been accepted as a principle under Italian legislation and further developments might be expected.⁴

C. Business network contracts

8. The business network contract (*contratto di rete*) was recently introduced into the Italian legal system by Law Decree No. 5 of 10 February 2009, converted into Law No. 33 of 9 April 2009 and further amended.⁵ This is an agreement by which “*more entrepreneurs pursuing the objective of enhancing, individually and collectively, their innovative capacities and competitiveness in the market, undertake a joint programme of collaboration in the forms and specific clusters as*

² In fact, some scholars limit the scope of this provision to funds established for the purposes of a public interest. Also those who tend not to pose any boundaries as long as interests are legitimate under the law, would yet exclude the establishment of a fund for the sole benefit of the settlor (“*auto-destinazione*”). As for case law, see the latest Tribunale Santa Maria Capua Vetere, decision as of 28 November 2013.

³ Consortia without external activities have no effect on third parties as they are only enforceable among the parties which undersigned them.

⁴ On the other hand, Italy ratified the 1985 Hague Convention on trust in 1989 (Law No. 364/89).

⁵ This has been further amended in 2009-2010 (Law No. 99/2009 and Law No. 122/2010) and in 2012 (Law No. 134/2012 and Law No. 221/2012).

they agree in the network contract, or to exchange information or services of an industrial, commercial, technical or technological nature, or to engage in one or more common activities within the scope of their business” (Article 3).⁶

9. The scope of business network contracts can thus broadly differ, and kind and degree of cooperation are left to the free agreement of parties, as long as, through the determination of a common programme, strategic goals are shared that allow either the improvement of innovative capacity or the growth of competitiveness. Cooperation can range from a plain undertaking to exchange information or services, to the organization of cooperation, up to the joint exercise of economic activities. In addition, the two mentioned goals of cooperation are widely interpreted: improvement of innovative capacity is understood to include any new opportunities that firms may have access to by virtue of belonging to a network, such as the development of new technical or technological opportunities. With regard to the growth of competitiveness, this is generally meant to increase the competitiveness of the members of the network or the network itself at both the national and international level, in the sense of opening business opportunities otherwise precluded to a single firm (such as access to funding, existing fiscal facilitations, or participation in public bids). This leaves the door open to vertical (coordination of suppliers with shared standards of production, distribution or franchise chains), or horizontal integration (research and development, centralized point of sale or of acquisition). Under the most recent amendment to the relevant legislation, business networks can also take part in public bids.⁷

10. Whatever categories can be abstractly drawn in respect of the business functions of network contracts, there is no specific type of network agreement for any of these entities: it is up to the parties to decide the organizational structure and functioning of their network. The sole requirement to enter into a business network contract is to be an entrepreneur, irrespective of the nature and the activities performed. This includes sole ownership, companies of all kinds and public entities, including those of a non-commercial nature, as well as for profit and non-profit entities (mixed networks do not seem to be precluded, where there are for profit and non-profit participants). Business networks, although factually mainly used as a scheme for cooperation of small and medium-sized enterprises, are thus generally open to any businesses, including corporations and groups.

1. Minimum content of the contract and registration

11. A business network contract must specify at a minimum:

- (i) The business or corporate name of each participant, as well as that of the network in the event that a common fund is constituted;
- (ii) Indication of the strategic objectives of the cooperation and the procedures agreed upon to measure progress towards these objectives;
- (iii) Description of the network programme, spelling out rights and obligations of each participant, the means of implementation of the common

⁶ As of 1 July 2014, 1,643 of such contracts have been established, involving more than 8,000 entrepreneurs (<http://contrattidirete.registroimprese.it>).

⁷ Italian Authority for the Oversight of Public Contracts for Works, Services and Supplies (AVCP), Resolution No. 3/2013.

purpose, and, in the case of a common fund, the measure and standards of evaluation of participants' contributions, as well as its management regulation;

(iv) Duration of the contract and rules for adhesion. Rules for early termination or withdrawal of a participant may also be inserted (in whose absence, general principles on termination of multiparty agreements with a common purpose apply);

(v) Name of the entity, if any, appointed to act as the body responsible for the administration of the execution of the contractor of individual parts or stages thereof;

(vi) Rules for decision-making of participants on any subject or aspect of common interest (not delegated to the body responsible for administration, if appointed).

12. The contract must be in writing, either by public deed or authenticated by a public notary, and be registered with the Business Registry of the place of registration of each of its members. Effectiveness of the contract runs from when the last of the prescribed registrations occurs, both among the contracting parties⁸ and against third parties: registration is thus a necessary and essential prerequisite for the legal validity of the contract (*pubblicità costitutiva*). Modifications to the network and the contract need also to be registered in the Business Registry of the member directly involved and must be directly communicated by the manager of the relevant Business Registry to all other Registries involved so as to have the change automatically included in each of them.

13. The contract may also provide for the establishment of a capital fund (*fondo patrimoniale*) and the appointment of a common body responsible for the management, in the name and on behalf of the participants, of activities for the execution of the contract or of individual parts or stages thereof.

2. Separate fund

14. In order to carry out the programme of the business network, contracting parties may establish a common fund. This is a separate fund exclusively devoted to implement the programme of the network and then to the pursuit of its strategic objectives. Creditors of individual participants to the network cannot rely on the fund, which only serves to satisfy claims deriving from the activities performed within the scope of the network. Provisions in the civil code on the constitution and effects of a fund in consortia apply, although the exact scope of such reference has to be assessed taking into account that a business network contract, as described above, might involve a much looser cooperation among members, where activities might be carried out individually albeit for a common purpose and under a common programme.

15. As mentioned above, the relevant contract must establish the extent and criteria for the evaluation of contributions. These can be either in cash or in goods and services. The contribution may also consist of a separate fund. In separate legislation, a common fund has also been foreseen for agricultural enterprises

⁸ However, some scholars are of the view that registration only affects enforceability against third parties, the network contract being valid among parties irrespective of its registration.

establishing a business network, which can in turn contribute to a national mutual fund for the stabilization of returns of this category of entrepreneurs.⁹

3. Governance

16. Governance of the network is left to contractual freedom. If a common body is appointed for the management of the activities of the fund, it will act in the name and on behalf of the network when it has legal personality, or in the name and on behalf of the members of the network if it has none.

4. Legal personality

17. Business networks do not normally have legal personality. However, the most recent amendments to relevant legislation (as of 2012) permit these to also be established with legal personality.¹⁰

II. France

[Original: French]
[5 September 2014]

A. Introduction

18. At its twenty-second session held in New York from 10 to 14 February 2014, Working Group I (micro, small and medium-sized enterprises) of the United Nations Commission on International Trade Law (UNCITRAL) requested the expertise of the French delegation on the French law applicable to micro-entrepreneurs choosing to operate their business individually (A/CN.9/800, §§ 42-46).

19. This paper is intended as a response to that request.

20. It presents in tabular form the various legal statuses offered by French law to micro-entrepreneurs choosing to operate their business individually. The statuses are presented in ascending order of legal, tax and social requirements.

21. By way of introduction, it should be noted that there is now a broad spectrum of regimes in French law tailored to small and medium-sized enterprises. These legal statuses, many of which are newly created, indicate the legislature's concern to promote the development of small businesses, which are recognized as essential to the growth of the modern economy. The legislative changes were made with a dual aim: on the one hand, to move towards *limited liability of the entrepreneur* in order to reduce the risks involved for the entrepreneur, and thus to lower this barrier to starting a business; and on the other hand, to introduce *greater flexibility in the operation of companies*, which, as legal entities, were previously subject to restrictive rules that were often unsuited to small and medium-sized enterprises.

⁹ DL 22 June 2012, No. 83 as converted into Law No. 134/2012.

¹⁰ As of 1 July, 159 business networks have been established with legal personality (<http://contrattidirete.registroimprese.it>).

1. *Auto-entrepreneur*

22. In addition to the legal measures proper, which will be discussed below, a simplified tax and social treatment has been applied since 2009 to very small enterprises. The status of *auto-entrepreneur* is worth mentioning, given the success it has had — in 2013, of the 379,300 enterprises created in France in the form of individual enterprises, 274,900 were *auto-entrepreneurs*. In legal terms, an *auto-entrepreneur* is a standard individual entrepreneur (meeting his/her business debts from the entirety of his/her personal and professional assets), but who has decided to opt, below a certain turnover threshold, for a simplified scheme for the calculation and payment of taxes and social security contributions.

23. The other notable feature of this status is the simplification of registration requirements and formalities, which can be completed online, all of which is aimed at reducing administrative costs and saving time. It should also be noted that online registration is now available for all statuses.

2. *Entreprise unipersonnelle à responsabilité limitée (EURL, single-person limited liability enterprise) and entrepreneur individuel à responsabilité limitée (EIRL, individual entrepreneur with limited liability)*

24. Regarding innovations to *limit liability*, the **EURL** is a limited liability company constituted by a single member which limits the member's personal liability to the amount of funds he/she has contributed to the company.

25. Thus, the legal device of a “partner-less company” allowing the single-person enterprise to take the form of a company was the first step towards limiting the liability of the individual entrepreneur. It is true, however, that in practice entrepreneurs continue to prefer operating directly under their own name and to be reluctant to fully utilize this regime. It should be noted that the single-person company regime, the implementation criteria of which are largely open, is applicable to all activities, whether commercial or agricultural, artisanal or liberal. Accordingly, it remains fully relevant and is maintained in parallel with the subsequent legal forms.

26. The law of 15 June 2010 followed a different path in creating the **EIRL**. This regime allows an individual entrepreneur to allocate a certain share of his/her assets to his/her professional activity in order that, in the event of financial difficulty, creditors have access to those professional assets only and not to the entrepreneur's personal assets. The entrepreneur is thus able to constitute professional assets, segregating those assets from his/her non-professional, personal, assets. Prior to the creation of the EIRL regime, the principle of the unity and universality of assets, as strictly defined in French law, was opposed to such segregation.

27. According to the Commercial Code, “[a]ny individual entrepreneur may allocate to his/her professional activity assets segregated from his/her personal assets without having to create a legal entity”. The benefit, under the EURL regime, is that the entrepreneur is in fact no longer required to create a separate legal entity. However, as indicated above, the introduction of the EIRL has not ousted the EURL, the two regimes continuing to exist in parallel.

3. *Société par actions simplifiée* (SAS, simplified joint stock company) and *société par actions simplifiée unipersonnelle* (SASU, single-person simplified joint stock company)

28. Regarding greater *flexibility in the organization and operation of companies*, the SAS and the SASU regimes offer contractual freedom in the manner in which they are organized and operated.

29. The SAS allows very broad operational flexibility, including allowing partners to freely arrange their respective rights without being bound by the rule of proportionality of voting rights to capital held. It should be recalled that the SAS was originally designed to provide a legal framework for enterprises wishing to set up a joint venture. SAS status is also used by start-ups on account of the opportunity it affords entrepreneurs to significantly open up the capital of the enterprise without losing control of it.

30. The SAS, under the SASU designation, may be used as an individual enterprise structure along the lines of the EURL. The SASU is not restricted to large-scale activities, the law of 4 August 2008 on the modernization of the economy having freed the SASU from the requirement of a minimum authorized capital and the obligation to appoint an external auditor.

31. In total, of the 158,900 companies created in France in 2013, 29 per cent were SASs (15 per cent) or SASUs (14 per cent), and 24 per cent EURLs.

B. Activities

Individual entrepreneur		EURL	EURL	SASU	
Standard regime	<i>Auto-entrepreneur</i>				
Creator					
Project					
Individual entrepreneur					
Suitable for small and secondary activities that require little investment	Suitable for small and secondary activities that (i) require little investment and (ii) fall under the tax regime for microenterprises	Suitable for small and secondary activities that require little investment More set-up and operational formalities than for standard or <i>auto-entrepreneur</i> regimes	Suitable for all activities More set-up and operational formalities than for EURL regime	Suitable for all activities More set-up and operational formalities than for EURL regime	Single member — natural person or legal person — with possibility of another SASU
Activity					
Any commercial, liberal, artisanal or agricultural activity	Any (i) commercial, (ii) liberal, under Cipav or RSI old-age insurance schemes, or (iii) artisanal activity	Any commercial, liberal, artisanal or agricultural activity	Any activity, except (i) accumulating and savings societies, and (ii) tobacco shops	Any activity, except (i) employment agencies for performing artists and (ii) tobacco shops	Single member — natural person or legal person — with possibility of another EURL

C. Capital

Individual entrepreneur		EURL	SASU
Standard regime	<i>Auto-entrepreneur</i>	EURL	
Capital			
Not applicable: no capital		Freely determined by single member in company's articles of association	
Subscription of contributions			
Not applicable: no capital		Possibility of contributing (i) in cash, (ii) in kind or (iii) in services or work	
Payment of contributions			
Not applicable: no capital		Contribution in kind: payment on subscription Contribution in cash: (i) obligatory payment of one fifth on subscription, and (ii) payment of surplus within 5 years	Contribution in kind: payment on subscription Contribution in cash: (i) obligatory payment of one half on subscription, and (ii) payment of surplus within 5 years

D. Management

Individual entrepreneur		EURL	SASU
Standard regime	<i>Auto-entrepreneur</i>		
Manager			
Individual entrepreneur		Manager must be natural person and may or may not be single member	Freely determined in articles of association with at least one chairperson who may be natural or legal person, and may or may not be single member
Appointment and removal of managers and term of office			
Not applicable		Freely determined in articles of association or by decision of single member	Freely determined in articles of association
Powers of manager			
Unlimited		Re. third parties: manager has most extensive powers to act on behalf of company Re. members: articles of association may limit manager's powers by requiring prior approval of single member for certain legal instruments or transactions	
Personal liability of individual entrepreneur or single member			
Unlimited Excl. immovable property not allocated to professional activity that is protected by declaration of exemption from seizure		Limited to assets allocated to professional activity	Limited to amount of his/her contribution
		Possibility also of making notarized declaration of exemption from seizure for immovable property not allocated to professional use	

E. Tax regime

Individual entrepreneur		EURL		SASU
Standard regime	<i>Auto-entrepreneur</i>	EURL		
Taxation of business profits				
Income tax in BIC, BNC or BA categories	Income tax (i) in BIC or BNC categories and (ii) in accordance with tax regime for microenterprises Option of paying income tax in instalments under certain conditions	Income tax in BIC, BNC or BA categories Possibility of opting for corporation tax if taxed according to (i) <i>régime réel</i> [taxation on actual profits], or (ii) <i>régime de déclaration contrôlée</i> [equivalent to <i>régime réel</i> for enterprises making non-commercial profits] (option irrevocable)	Income tax in BIC, BNC or BA categories in name of single member Corporation tax option (option irrevocable)	Corporation tax Possibility of opting for income tax under certain conditions for SASUs in operation for less than 5 years
Deduction of manager's remuneration				
No	No, unless corporation tax option selected	Yes, unless income tax option selected		
Tax regime for manager's remuneration				
Business profits subject to income tax include manager's remuneration	If enterprise is subject to income tax include manager's remuneration	If enterprise is subject to income tax, business profits subject to income tax include manager's remuneration		
	If enterprise is subject to corporation tax, manager's remuneration is subject to income tax in wages and salaries category	If enterprise is subject to corporation tax, manager's remuneration is subject to income tax in wages and salaries category		

F. Social security regime

Individual entrepreneur		EURL	SASU
Standard regime	<i>Auto-entrepreneur</i>		
Social security regime of manager			
Self-employed person	Self-employed person, but simplified calculation and payment of social security contributions (microsocial regime)	Self-employed person	Self-employed person if manager is single member <i>Assimilé-salarié</i> if manager is third party [<i>Assimilé-salarié</i> benefits from social security and employees' pension scheme, but not from unemployment insurance or employment law provisions]
Self-employed person			<i>Assimilé-salarié</i>
Basis for calculating social security contributions			
Taxable profit	Turnover	<p>If EURL is subject to income tax: taxable profit</p> <p>If EURL is subject to corporation tax: net remuneration + share of dividends received above 10% of value of allocated assets, or above 10% of net profit, if this profit is greater than allocated assets</p>	<p>If EURL is subject to income tax: taxable profit</p> <p>If EURL is subject to corporation tax: net remuneration + dividends for part above 10% of capital, share premiums and amounts paid into current account</p> <p>If SASU is subject to corporation tax: net remuneration</p> <p>If SASU is subject to income tax: taxable profit</p>

C. Operation

Individual entrepreneur		EURL	SASU
Standard regime	<i>Auto-entrepreneur</i>	EURL	
Obligations related to operation of enterprise			
No specific obligations	<p>Dedicated business bank account</p> <p>Separate accounting for professional activity</p> <p>Publication of annual accounts</p>	<p>Appointment of managers in (i) articles of association or (ii) separate instrument</p> <p>Special register of decisions of single member</p> <p>Filing of annual accounts and inventory</p> <p>Annual management report, unless exempt</p>	
External auditor			
No		<p>No, unless two of the following three conditions are met:</p> <ul style="list-style-type: none"> - Balance sheet > €1,550,000 - Turnover excluding taxes > €3,100,000 - More than 50 employees 	<p>No, unless two of the following three conditions are met:</p> <ul style="list-style-type: none"> - Balance sheet > €1,000,000 - Turnover excluding taxes > €2,000,000 - More than 20 employees

H. Start-up formalities

Individual entrepreneur		EURL	EURL	SASU
Standard regime	<i>Auto-entrepreneur</i>			
Formalities				
(i) Declaration to CFE and (ii) registration with RCS, RM or RSAC, depending on nature of activity No articles of association	Declaration to CFE, with exemption from registration with RCS or RM in certain cases No articles of association	Declaration to CFE Register declaration of assets allocation with RCS, RM, RSEIRL or RSAC No articles of association	Prepare articles of association CFE issues standard articles of association for EURLs managed by single member (natural person)	Prepare articles of association
Costs of start-up formalities				
RCS registration for traders: around €62 RM registration for artisans: around €185 (this amount may vary from department to department) Registration with Urssaf for liberal professions: free Registration with RSAC for sales representatives: around €26	If exempt from RCS or RM registration: free If not exempt from RCS or RM registration: cf. standard regime If liberal profession: free	Declaration of assets allocation: - Free for traders, artisans and sales representatives if submitted at same time as corporate declaration (otherwise from €42 to €55.65 depending on type of activity) - Auto-entrepreneurs exempt from RCS or RM registration: €55.97 - Liberal professions: €55.97	Publication costs (legal gazette): around €190 RCS registration (including filing of legal instruments): around €84	Publication costs (legal gazette): around €230 RCS registration (including filing of legal instruments): around €84

I. Transfer

Individual entrepreneur		EURL	SASU
Standard regime	<i>Auto-entrepreneur</i>		
Transfer			
Sale of business or client base Business assets transferred to company Business leasing-management, except for EIRL		Sale of business or client base Transfer of shares	Sale of business or client base Transfer of shares

J. Advantages and disadvantages

Individual entrepreneur		EURL	EURL	SASU
Standard regime	<i>Auto-entrepreneur</i>			
Advantages				
Simple to set up and operate	<p>Personal liability limited to assets allocated to professional activity</p> <p>Option of corporation tax regime under certain conditions (option irrevocable)</p>	<p>Personal liability of single member limited to amount of his/her contribution</p> <p>Adaptable structure (ability to accommodate new member)</p> <p>Choice of tax regimes</p> <p>Simple to operate</p>	<p>Personal liability of single member limited to amount of his/her contribution</p> <p>Adaptable structure (ability to accommodate new member)</p> <p>Choice of tax regimes</p> <p>Manager under <i>assimilé-salarie</i> social security regime</p>	
Disadvantages				
Unlimited personal liability (excl. immovables not allocated to professional activity that are protected by declaration of exemption from seizure)	Formalities and costs of set-up and operation greater than with standard or <i>auto-entrepreneur</i> regimes	Formalities and set-up/operational costs		

Abbreviations

BA:	Agricultural profits
BIC:	Business profits
BNC:	Non-commercial profits
CFE:	Business formalities centre
Cipav:	Interprofessional provident and old-age insurance fund
RCS:	Register of companies
RM:	Trades register
RSAC:	Special register of sales representatives
RSEIRL:	Special register of individual entrepreneurs with limited liability
RSI:	Social income for self-employed persons
Urssaf:	Social security and family allowance contribution collection offices