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ПРОСУБ'ЄКТНА КОНЦЕПЦІЯ ПІДПРИЄМСТВА

Анотація. Актуальність дослідження зумовлюється необхідністю виявлення оптимальної моделі закріплення поняття «підприємство» та необхідністю взаємного узгодження понять (зокрема, тотожних) в межах економічних відносин у контексті сучасної тенденції оновлення законодавства. Стаття присвячена аналізу поняття «підприємство», об'єктивованого одночасно у Цивільному кодексі України в якості об'єкта цивільних прав та у Господарському кодексі України – в якості суб'єкта господарських правовідносин. З метою виявлення оптимального підходу до розуміння терміну «підприємство» проаналізовано законодавчі положення про підприємство, закріплені у Господарському кодексі України. Констатовано, що кваліфікуючою ознакою підприємства, як організаційної форми господарювання, є його державна реєстрація (створення) за Господарським кодексом України. Втім, на підставі аналізу положень про державну реєстрацію (створення) юридичних осіб, закріплених в Цивільному кодексі України, та положень про державну реєстрацію (створення) суб'єктів господарювання, встановлених Господарським кодексом України, констатовано відсутність таких особливостей державної реєстрації (створення) підприємства, встановлених у Господарському кодексі. З метою виявлення місця підприємства у системі суб'єктів господарських правовідносин, відповідне поняття співставлено з іншими суб'єктами відповідних відносин (суб'єкт господарювання; господарська організація) та з міжгалузевим учасником підприємницьких правовідносин – юридичною особою. На підставі аналізу наведених понять виявлені недоліки законодавчої техніки як у дефініції підприємства за Господарським кодексом України, так і інших його дефінітивних норм, що стосуються визначення природи досліджуваного поняття (визначення суб'єкта господарювання; господарської організації та загальне викладення норм щодо суб'єктів

(учасників) господарських відносин). Встановлено, що за відсутності чітко структурованої системи суб'єктів господарського права, визначення місця підприємства у відповідній системі вбачається необґрунтованим (особливо у контексті об'єктивізації підприємства у Цивільному кодексі України). Викладене зумовлює наявність низки проблем у правозастосовній практиці, пов'язаних не лише з неузгодженістю двох кодифікованих актів, предмет правового регулювання яких принаймі частково співпадає, а і з відсутністю системності у викладенні положень про суб'єктів господарських відносин.

Ключові слова: господарські відносини, учасники цивільного обороту, об'єкти цивільних прав, юридична особа.

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PRO-SUBJECTIVE ENTERPRISE CONCEPT

Abstract. *The article is devoted to the enterprise concept theoretical framework development, which is objectified in both Civil and Economic codes of Ukraine. Thus, named concepts are fundamentally different. In particular, Civil Code of Ukraine recognises enterprise as an object. In the same time Economic code gives a birth to prosubjective enterprise concept. Nevertheless, both legal acts are aimed to regulate economical relationships, which results to doctrinal and practical needs to identify the optimal approach of understanding the nature of enterprise under the current legislation of Ukraine. In order to identify the place of the enterprise in the system of subjects of economic relations, the relevant concept is compared with other subjects of the economic relations (business entity; business organization) and with the intersectoral participant of business relations – a legal entity. Based on the analysis of these concepts, the Authors claimed a non-systematic approach to concept defining under the Economic Code of Ukraine and other shortcomings of legislative techniques in the definition of the enterprise under named act, which resulted in the absence of a clearly constructed system of subjects of economic law. Thus, the establishment of the place of the enterprise in the relevant system seems impractical.*

Keywords: legal entity, Economic code of Ukraine, Civil code of Ukraine, company.

INTRODUCTION

The current legislation implements two opposite concepts of the enterprise. This refers to Article 191 of the Civil Code of Ukraine¹ and Article 62 of the Commercial Code of Ukraine². The Article 191 of the Civil Code of Ukraine³ establishes that an enterprise is a single property complex used for business activities (Part 1). Part 2 of the cited provision details the composition of the enterprise as a single property complex, and Part 4 stipulates that the enterprise (or its part) may be the object of several transactions. Therewith, Article 62 of the Commercial Code of Ukraine⁴ defines an enterprise as an independent business entity established by a competent state authority or local government, or other entities to meet social and personal needs through the systematic implementation of production, research, trade, and other economic activities stipulated by the Commercial Code of Ukraine and other laws.

The above regulatory provisions lead to lively scientific discussions on the legal nature of the enterprise, the feasibility of prescribing such a structure in regulations, as well as the scientific validity of the above approaches, their compliance with established legal traditions and formal logic. Thus, some scholars, perceiving the approach laid down in the above provisions of the Civil Code of Ukraine, define the company as a participant (subject) of economic relations [1-3]. However, civil studies are based on the qualification of the enterprise as an object of civil rights [4-7]. In foreign studies, many scientists have investigated the corporate concept of the enterprise [8-16]. The above confirms the relevance of the doctrinal analysis of the concept of enterprise, its legal nature and the application of legal constructions laid down in the cited articles of the Civil and Commercial Codes of Ukraine.

The scientific discussion on the "pro-object" or "pro-subject" concept of the enterprise, as a system-forming category for the regulation of economic relations, has corresponding statutory origins. Thus, the choice of a concept largely depends on the definition of a legal act, which is considered a proper regulator of the corresponding legal relations. In these circumstances, it can be stated that there is a rather long doctrinal discussion on the correlation between the Civil and Commercial Codes as regulators of business relations [7]. In this context, it is necessary to support O. O. Pervomaisky, according to whom, the idea of the correlation of one code to another implies mutual coherence of their general provisions, which, apparently, is missing from these acts [7].

Apart from the ideal purpose – to prove the absence of a constructive idea in the Civil Code of Ukraine, a comprehensive study of the concept of "enterprise" provides a solution to a purely utilitarian issue – the elimination of a set of important law enforcement issues. Notably, the thesis of the homonymy of the concept of "enterprise" is not seen as a strong argument in support of the pro-subjective concept of enterprise, as both terms are used in a very specific area of legal relations (which will be discussed in more detail below). Thus, it is necessary to study the "viability" of the corresponding provisions of the Civil and Commercial Codes of Ukraine for legal science and practice.

¹ Civil Code of Ukraine. (2003, January). Retrieved from <https://zakon.rada.gov.ua/laws/show/435-15>

² Commercial Code of Ukraine. (2003, January). Retrieved from <https://zakon.rada.gov.ua/laws/show/436-15>.

³ Civil Code of Ukraine, op. cit.

⁴ Commercial Code of Ukraine, op. cit.

The purpose of the study is to analyse the concept of enterprise (in particular, its pro-subject concept) by comparing it with other types of business entities and determining the place of the enterprise in the system of such entities.

1. MATERIALS AND METHODS

The regulatory framework for this study included codified regulations governing economic relations – the Civil Code of Ukraine and the Commercial Code of Ukraine; regulations that govern the specific features of particular legal forms of legal entities (Laws of Ukraine "On Freedom of Conscience and Religious Organisations"¹ and "On Protection of Economic Competition"²).

Philosophical, general scientific, and special scientific methods of cognition were used in the study. The dialectical method was used to analyse doctrinal approaches to the definition of terms such as "enterprise", "business entity", "economic organisation", "legal entity", as well as to cover the basic properties of these concepts. Aristotelian methods (analysis, synthesis, abstraction, generalisation, analogy, induction and deduction) were used to study particular features (signs, characteristics) of the enterprise as a subject of economic relations, as well as other economic and legal pro-subject structures mentioned above. The leading Aristotelian method is the analysis by means of which the enterprise as an economic entity was imaginatively divided into separate signs (features, characteristics) which were investigated separately as a part of the whole (collective) concept. Thus, it is a matter of establishment of such signs of the enterprise as its belonging to subjects of managing; independence; creation by a competent entity, and the purpose of its creation. Similarly, the economic organisation as a business entity, the features (signs, characteristics) of which are determined: the status of a legal entity and the creation in accordance with the Civil Code of Ukraine³. The types of business entities and economic organisations were studied in an analogous way.

With the help of abstraction, these features were studied separately (in particular, in terms of their applicability and legitimacy in specific regulations). The method of abstraction allowed to formulate the conclusions of the study, and deduction and induction – to make a corresponding search for the original ideas (regulations and relevant doctrinal provisions). Thus, induction and deduction were used to find the necessary material to generalise and abstract the statutory pro-subjective approach to the concept of enterprise. In particular, it is a matter of establishing the dualistic nature of the term "enterprise" within the Commercial Code of Ukraine.

Formal legal (dogmatic or legal technical) method was used to study and interpret the provisions of the Civil and Commercial Codes of Ukraine, as well as to describe and systematise them. The comparative legal method was used to compare the concepts of "enterprise" in foreign law and "economic organisation", "business entity", "legal entity", "enterprise" in the Civil Code of Ukraine. This method was also used to compare certain rules on a legal entity in the Civil Code of Ukraine and an enterprise (economic

¹ Laws of Ukraine No 987-XII "On Freedom of Conscience and Religious Organizations". (1994, April). Retrieved from <https://zakon.rada.gov.ua/laws/show/2210-14#Text>

² Law of Ukraine No 2210-III "On Protection of Economic Competition". (2001, January). Retrieved from <https://zakon.rada.gov.ua/laws/show/2210-14#Text>

³ Civil Code of Ukraine. (2003, January). Retrieved from <https://zakon.rada.gov.ua/laws/show/435-15>

organisation; business entity) in the Commercial Code of Ukraine¹, as well as rules aimed at protecting economic competition in the Commercial Code of Ukraine and the Law of Ukraine "On Protection of Economic Competition". The comparative legal method was also used to compare the procedures for establishing a business entity (legal entity) under the Civil and Commercial Codes of Ukraine in order to identify differences in the corresponding procedures.

The historical method allowed to study the concept of "enterprise" in retrospect and to establish the purpose of its legislative consolidation.

2. RESULTS AND DISCUSSION

2.1 Enterprise as a business entity

The definition of an enterprise as a subject of economic relations is contained in Article 62 of the Commercial Code of Ukraine, according to which an enterprise is an independent business entity established by a competent public authority or local government or other entities to meet public and personal needs through systematic implementation of production, research, trade, other economic activities in accordance with the procedure prescribed by the Commercial Code of Ukraine and other laws. The following features of an enterprise can be distinguished from the above definition: (1) only an economic entity can be considered an enterprise; (2) such entity must be independent; (3) the entity competent to establish the enterprise may be: (a) a public authority; (b) a local self-government body; (c) another entity; (4) the enterprise must be established for the specific purpose of: (a) meeting social needs; (b) meeting personal needs; (5) the purpose of the enterprise must be realized in a specified way, namely by systematic implementation of production, research, trade or other activities in accordance with the procedure prescribed by the Commercial Code of Ukraine and other laws. Each of the above features of the enterprise requires specification.

As noted, an enterprise can only be a business entity, the definition of which is contained in Part 1 Article 55 of the Commercial Code of Ukraine. According to the content of the cited provision, economic entities are participants of economic relations who carry out economic activity, exercising economic competence (set of economic rights and obligations), have separate property and are responsible for their obligations within this property, except in cases prescribed by law. Notably, despite the definition of the enterprise through the lens of its belonging to business entities, Part 2 Article 55 of the Commercial Code of Ukraine does not operate the concept of enterprise in terms of defining the types of business entities. Instead, Article 55 of the Commercial Code of Ukraine defines business entities as: (1) economic organisations and (2) citizens of Ukraine, foreigners or stateless persons engaged in economic activity and registered in accordance with the law as entrepreneurs. Note that the purpose and objectives of this study do not provide a full analysis of the concept of business entity. Therewith, belonging to this generic category of the concept of enterprise necessitates partial coverage of related concepts in order to clarify the legal nature of the enterprise (i.e., the scope of generic concepts used to denote the subjects (participants) of economic relations

¹ Commercial Code of Ukraine. (2003, January). Retrieved from <https://zakon.rada.gov.ua/laws/show/436-15>.

to which the enterprise belongs, and places of the enterprise in the system of subjects (participants) of economic relations).

Based on the statutory definition of "economic organisation" (a legal entity established in accordance with the Civil Code of Ukraine; state, municipal, or other enterprise established in accordance with the Commercial Code of Ukraine, as well as other legal entities engaged in economic activity and registered in accordance with law), it is possible to come to a conclusion about belonging of the enterprise to the economic organisations. Therefore, it can be stated that there are a certain shortcomings of rule-making techniques that lead to artificial complication of the system of economic entities, because in the presence of a narrower concept used to denote business entities, it appears more reasonable to define the category of enterprise with the help of the category of "economic organisation" and not "business entity". In turn, the Commercial Code of Ukraine¹ also divides economic organisations into the following types: (1) a legal entity established in accordance with the Civil Code of Ukraine; (2) a state, municipal, or other enterprise established in accordance with the Commercial Code of Ukraine; (3) other legal entities engaged in economic activity and registered in accordance with the procedure prescribed by law. The above suggests that the enterprise belongs to the second group of economic organisations (state, municipal, or other enterprises established in accordance with the Commercial Code of Ukraine).

It is important to add that the term "enterprise" also has a dualistic nature within the Commercial Code of Ukraine. It refers to the simultaneous extension of this term to (1) state, municipal, and private enterprises as a legal form of an economic entity and (2) the designation of other legal forms of legal entities by this term (first of all, it refers to conditional extension of features inherent in the term *enterprise* or even *company*, known to many foreign legal orders, to an enterprise in Ukrainian legislation).

The above does not contribute to the existence of a clear, scientifically sound and practically appropriate system of subjects (participants) of economic relations and only burdens the national legislation with a significant number of mutually inconsistent concepts. Therefore, it is not possible to definitively determine which enterprises (as a legal form of a legal entity or as an independent business entity, the features of which are enshrined in Article 62 of the Commercial Code of Ukraine) are referred to in Part 2 Article 55 of the Commercial Code of Ukraine. At the same time, considering the absence of other references in the text of the cited article to the concept of "enterprise" and the lack of mandatory rules for classifying an enterprise as a type of economic organisation, the concepts of enterprise presented in Part 2 Article 55 of the Commercial Code of Ukraine and in Article 62 of the Commercial Code of Ukraine are presumably identical. Thus, the "enterprise" means the [economic] organisation created (registered) in accordance with the procedure prescribed by the Commercial Code of Ukraine (which should be the criterion for its separation from the list of other economic organisations).

2.2 *Enterprise as an economic organisation*

Part 2 Article 55 of the Commercial Code of Ukraine gives grounds to conclude that the criterion for distinguishing an enterprise from other economic organisations is the procedure for its creation (such economic organisations must be created in accordance

¹ Commercial Code of Ukraine. (2003, January). Retrieved from <https://zakon.rada.gov.ua/laws/show/436-15>.

with the procedure prescribed by the Civil Code of Ukraine). This conclusion necessitates the clarification of the specific features of registration (establishment) of the enterprise as a legal entity, which are regulated in the Commercial Code of Ukraine. Therewith, in the above context, the "specific features" mean such legally significant characteristics of the registration (establishment) of the enterprise, which should be stipulated by the Commercial Code of Ukraine, and not contained in other regulations (or, at least, in the Civil Code of Ukraine, as in the act mentioned in the Commercial Code of Ukraine in contrast to the Commercial Code itself). Therewith, Article 56 of the Commercial Code of Ukraine ("Establishment of a business entity") does not contain the specific features of the establishment of an enterprise as a special form of economic entity. Moreover, the cited article in its content is a reproduction of several legislative provisions related, in particular, to the creation of a legal entity and certain provisions of competition law. Thus, Part 1 of the cited provision prescribes the establishment of a business entity by the decision of the owner(s) of the property or its authorised body in cases established by law. This also makes provision for the possibility of creating a business entity by decision of other bodies, organisations, and individuals by establishing a new economic organisation, merger, accession, separation, transformation of the existing economic organisation(s) in compliance with the requirements of the legislation.

It can be stated that all the above provisions are based on the provisions of the Civil Code of Ukraine on the establishment of a legal entity. This refers to Part 2 Article 81 and Article 87 of the Civil Code of Ukraine. The "specific features" of the establishment of a business entity in the cases stipulated in Part 1 Article 56 of the Commercial Code of Ukraine¹, constitute the decision of the property owner. Admittedly, the phrase "property owner's decision" can be defined as a tribute to the Soviet theory of economic and administrative law and the long prevailing ideology, while in the 2020s, this phrase is nothing short of a bitter misunderstanding.

The establishment of a business entity through mergers, acquisitions, spin-offs, divisions, and transformations also cannot be determined by the feature stipulated in the Commercial Code of Ukraine, considering the detailed regulation of these structures in the Civil Code of Ukraine². Furthermore, the provision of Article 56 of the Commercial Code of Ukraine refers exclusively to the procedure for establishing legal entities. Therewith, as mentioned above, the specified article is entitled "Establishment of a business entity". Given the provisions of Article 55 of the Commercial Code of Ukraine, which also includes individuals as business entities, the very name of Article 56 of the Commercial Code of Ukraine is considered to be incorrect and failing to meet the requirements of formal logic.

Part 2 Article 56 of the Commercial Code of Ukraine stipulates that the creation of an economic entity is possible by compulsory division (separation) of the existing economic entity by order of the antimonopoly authorities in accordance with the antitrust and competition legislation of Ukraine. This rule reproduces the provisions of Part 4 Article 81 of the Civil Code of Ukraine, which is detailed in Article 53 of the Law of Ukraine "On Protection of Economic Competition". In this case, as noted above, Article 56 of the Commercial Code of Ukraine operates with the generic concept of "business

¹ Commercial Code of Ukraine. (2003, January). Retrieved from <https://zakon.rada.gov.ua/laws/show/436-15>.

² Civil Code of Ukraine. (2003, January). Retrieved from <https://zakon.rada.gov.ua/laws/show/435-15>

entity", and therefore, this rule should be applied to individuals-entrepreneurs. Thus, Article 56 of the Commercial Code of Ukraine does not establish any features of the creation of business entities, compared with the Civil Code of Ukraine and acts of special legislation.

Thus, Part 3 Article 56 of the Commercial Code of Ukraine establishes the obligation to comply with the requirements of antitrust and competition law in the establishment of economic entities. At the same time, this requirement is, firstly, presumed; secondly, it is the duty of newly created legal entities in accordance with the Law of Ukraine "On Protection of Economic Competition"¹; thirdly, it does not contain additional (compared to the provisions of the Law of Ukraine "On Protection of Economic Competition") instruments of protection against violations of the law, as it does not make provision for specific legal consequences of violation of these provisions.

In accordance with Part 4 Article 56 of the Commercial Code of Ukraine² an economic entity may be created and operate based on a model statute approved by the Cabinet of Ministers of Ukraine, which after its adoption by the participants becomes a constituent document. Therewith, the above provision of the Commercial Code also cannot be determined as a specific feature of the creation of an economic entity, considering the existence of a corresponding provision in the Civil Code. In this context, it should be noted that in the Commercial Code of Ukraine, the phrase "legal entity" is mechanically replaced with the phrase "business entity". Furthermore, the above-cited provision of the Commercial Code does not apply to one of the types of business entities – citizens of Ukraine, foreigners, and stateless persons engaged in economic activity and registered in accordance with the law as entrepreneurs. The above gives grounds for a general conclusion that the Commercial Code of Ukraine has both significant defects in rule-making techniques and a lack of formal logic.

Part 5 Article 56 of the Commercial Code of Ukraine, which regulates certain technical issues regarding the information reflected in the decision to establish an economic entity in case of its establishment on the basis of a model charter, is no exception in the context of determining the "specific features" of the establishment of a business entity. Thus, the above rule reproduces the general requirements for the establishment of a legal entity (in particular, Articles 88-90 of the Civil Code of Ukraine³). This suggests that there are no specific features of the establishment of an economic entity, compared to the procedure for creating a "classic" legal entity, prescribed by the Civil Code of Ukraine. Furthermore, the above indicates the inability of the criterion for the division of economic entities into species, laid down in Part 2 Article 55 of the Commercial Code of Ukraine, to justify the feasibility of separating economic organisations from other legal entities.

From the standpoint of formal logic, the concept of economic organisation also causes disapproval, the features of which are determined in the Commercial Code of Ukraine as follows: (1) the status of a legal entity; (2) establishment in accordance with the Civil Code of Ukraine (especially in the context of the lack of features of the

¹ Law of Ukraine "On Protection of Economic Competition". (2001, January). Retrieved from <https://zakon.rada.gov.ua/laws/show/2210-14>

² Commercial Code of Ukraine. (2003, January). Retrieved from <https://zakon.rada.gov.ua/laws/show/436-15>.

³ Civil Code of Ukraine. (2003, January). Retrieved from <https://zakon.rada.gov.ua/laws/show/435-15>

establishment of an economic organisation prescribed in the Commercial Code of Ukraine). Thus, the fact of economic activity cannot be considered a classification feature of an economic organisation, as the same feature is inherent in the generic concept – the business entity. Thus, the only qualifier of an economic organisation is the status of a legal entity. Another business entity is defined as citizens of Ukraine; foreigners and stateless persons who carry out economic activities and are registered in accordance with the law as entrepreneurs. Therewith, Part 3 Article 55 of the Commercial Code of Ukraine does not operate the concept of "economic organisation" (although it is special in relation to the general rules of Part 1-2 of the same article), but uses the concept "legal entity – business entity". The above leads to the conclusion about the artificiality and obvious eclecticism of the concept of economic organisation.

The concept of economic organisation is not used in the definition of enterprise contained in Article 62 of the Commercial Code of Ukraine¹, which uses another generic concept – business entity (despite the list of particular types of enterprises in the definition of economic organisations). Thus, the concept of economic organisation has no real meaning, its use in the Commercial Code of Ukraine is inconsistent and fragmentary. Thus, it is impossible to define the concept of "enterprise" through the lens of its belonging to economic organisations. Notably, the need to objectify the concept of enterprise in the legislation was largely justified by the actual existence of enterprises as a rudimentary legal form of a legal entity in Soviet law. Therewith, there is no correlation between the statutory definition of an enterprise contained in the Commercial Code and legal entities called "enterprises" in the corresponding state register.

2.3 Other features of the enterprise as a business entity

The first and defining feature of an enterprise prescribed in Article 62 of the Commercial Code is its establishment by a competent public authority or local government body, or other entities. In this case, as noted, the Commercial Code of Ukraine does not contain provisions governing the specific features of the establishment of the enterprise, and the article on the establishment of economic entities is the result of a rather unsuccessful "cloning" of the corresponding provisions of the Civil Code (this refers to mechanistic replacement of the term "legal entity" with the term "business entity"). Considering the belonging of the enterprise to legal entities and the lack of substantive features of this concept, this feature is obviously purely declarative and not burdened with additional qualifying content. The list of entities authorised to establish enterprises is not exhaustive. Therefore, the subjective composition of the persons authorised to establish an enterprise cannot be determined as the feature of an enterprise.

State bodies, local governments, as well as other entities, have the right to establish legal entities in general and enterprises in particular, which eliminates the necessity of additional separation of the right of these entities to establish enterprises. The enterprise has the status of a legal entity enshrined in Part 4 Article 62 of the Commercial Code. Therewith, it is absolutely incomprehensible to duplicate the provisions on a legal entity (which apply to an enterprise *a priori*) in the given article. Duplication of general principles concerning the institution of a legal entity also takes place in Part 3 Article 62

¹ Commercial Code of Ukraine. (2003, January). Retrieved from <https://zakon.rada.gov.ua/laws/show/436-15>.

of the Commercial Code of Ukraine – the right of an enterprise to act based on a charter or model charter; as well as, apparently, the attempt to paraphrase the provision on equality of the state as a participant in civil relations, which has become the equality of enterprises that can be created by the state.

The legal and technical defects in Article 62 of the Commercial Code are not limited to duplication of concepts and inconsistencies with other articles of this codified act. In particular, the presence of such a rudiment as "form of ownership" in Part 3 Article 62 of the Commercial Code deserves attention.

According to Part 5 Article 62 of the Commercial Code of Ukraine, the enterprise does not include other legal entities. Therewith, according to Article 95 of the Civil Code of Ukraine, legal entities may have separate divisions (branches and representative offices), but the concept of a legal entity does not make provision for the establishment of other legal entities within the legal entity. Thus, the above provision of the Commercial Code does not establish any features of enterprises as legal entities. Another feature of the enterprise, based on the content of Part 1 Article 62 of the Commercial Code, is the purpose of its creation – to meet public or personal needs. However, the declared purpose is quite broad, as social and personal needs are an evaluative concept that can cover any activity.

Returning to the history of the emergence of the category of enterprise in the current legislation, it should be noted that it is a legacy of Soviet law. This term received new life in connection with the adoption of the Law "On Enterprises in Ukraine"¹ in 1991, which introduced the concept of "private enterprise" into the legislation [17]. In Soviet law, the declaration of satisfaction of social needs was fully consistent with the prevailing ideology and features of determining the legal status of economic entities, the owner of which, in a certain form, was the state. At the same time, the modernisation of "personal needs" greatly expanded the concept of enterprise, which made it impossible to define any specific (identifying) features of the enterprise as an independent legal structure.

The further preservation of the concept of the enterprise in the Commercial Code of Ukraine² caused a wave of criticism in legal science. This is refers to the definition of a private enterprise as one that is based on the property of an individual [18]; partial coincidence of unitary and subsidiary enterprises [17]; use of "quasi-verbal" constructions of economic management and operational management [17]; the absence of a clearly defined object of ownership of unitary enterprises [17], etc. Thus, the purpose of the enterprise cannot be considered as its identifying feature. Part 1 Article 62 of the Commercial Code of Ukraine contains another feature of the enterprise as a subject of economic relations – the systematic implementation of production, research, trade, other economic activities in accordance with the procedure prescribed by the Commercial Code of Ukraine and other laws.

In the context of the above, it should be noted that the activities of the enterprise are formulated quite broadly, because the implementation of production, research, trade, and other economic activities in general corresponds to the implementation of

¹ Law of Ukraine No 887-XII "On Enterprises in Ukraine". (1991, March). Retrieved from <https://zakon.rada.gov.ua/laws/show/887-12#Text>.

² Commercial Code of Ukraine. (2003, January). Retrieved from <https://zakon.rada.gov.ua/laws/show/436-15>.

entrepreneurial activities for profit (it is a definition of business partnership in Article 84 of the Civil Code of Ukraine¹). Therewith, the above casuistic list of activities only excessively complicates the definition of the enterprise. Notably, Article 3 of the Commercial Code of Ukraine establishes that economic activity in this code means the activity of an economic entity in the field of social production, aimed at manufacturing and selling products, performing works or rendering services of a cost nature that has a price value. Ignoring the legal technique of the Commercial Code of Ukraine, in which the concept of economic activity is defined with the help of the term "business entity" and, conversely, the qualifying feature of the business entity is the implementation of economic activity, it can be stated that the qualifying feature of economic relations are value nature and price certainty.

Notably, the concept of "social production" only aggravates the concept of economic activity, because by its nature it can be an exclusively doctrinal (as opposed to a statutory) feature of economic relations. This wording does not affect the qualification of each particular limited liability company, state enterprise, or production cooperative as a business entity, and its activities – as a business entity. In such circumstances, the legal form (Article 83 of the Civil Code of Ukraine), the type of legal entity (Article 81 of the Civil Code of Ukraine), the type of company (Articles 84, 85 of the Civil Code of Ukraine), etc. have legal significance. It is seen that the cost nature and price certainty of economic activity can be determined by the real qualifying features of economic activity. At the same time, in the Commercial Code of Ukraine, the relevant definition is burdened by additional features, which, in turn, are used fragmentarily and unsystematically (for example, economic organisation), and some of them have no legal significance (for example, social production as a purpose).

The artificial nature of the framework of concepts of the Commercial Code of Ukraine is also confirmed by the analysis of such concepts as "non-commercial management" (Article 52 of the Commercial Code of Ukraine), which correlates with Part 2 Article 62, according to which an enterprise can be established for non-commercial economic activity as well. The wording "non-commercial economic activity" appears to be a legal oxymoron. Its inclusion in the text of the Commercial Code of Ukraine is explained by the necessity of providing economic entities with the opportunity to carry out both commercial and non-commercial activities. The above correlates with the thesis of a certain symmetry of the concepts "business entity" in the Commercial Code and "person" in the Civil Code, which, at least from a legal and technical stand point, raises fair objections. [7].

Notably, the recognition of non-commercial activity as a part of the subject of regulation of the Commercial Code of Ukraine contradicts the above provisions according to which economic activity is of a value nature. In the context of the above, attention should be paid to such results of the rise of scientific and rule-making thought as "enterprises of religious organisations" (Article 112 of the Commercial Code of Ukraine). The economic and legal status of these organisations is justified, in particular, by the production of products by religious organisations and the presence of the so-called "halo" effect in the economic activities of religious organisations, which lies in

¹ Civil Code of Ukraine. (2003, January). Retrieved from <https://zakon.rada.gov.ua/laws/show/435-15>

subconsciously greater consumer confidence in products produced and sold by religious organisations [19].

First of all, the idea of combining the name of a particular subject of legal relations – a religious organisation – and the concept of enterprise is considered as competing with formal logic and common sense. An example of a similar wording could be considered a "production cooperative legal entity", etc. Furthermore, in the context of the above, the provisions of special legislation should also be considered. This is the Law of Ukraine "On Freedom of Conscience and Religious Organisations"¹, Article 7 of which stipulates that religious organisations in Ukraine are established to meet the religious needs of citizens to profess and spread the religion and act in accordance with their hierarchical and institutional structure, elect, appoint, and replace staff in accordance with their statutes (regulations). Religious organisations in Ukraine are religious communities, administrations and centres, monasteries, religious fraternities, missionary societies (missions), spiritual educational institutions, as well as associations comprising the above-mentioned religious organisations. Religious associations are represented by their centres (departments).

The above suggests the artificiality and illogicality of the extension of the concept of enterprise to religious organisations. In this case, the implementation of such activities (along with their core business, unless otherwise stipulated by law and if this activity meets the purpose for which they were created and contributes to its achievement) does not necessitate artificial substitution of legal form of such non-entrepreneurial legal entities. Moreover, Article 86 of the Civil Code of Ukraine regulates the implementation of business activities by non-profit companies and institutions.

CONCLUSIONS

One of the properties of law as a social regulator is its following the real development of social relations not only in terms of the introduction of new institutions, but also the timely response to the loss of relevance of specific legal models. One of the rudiments that contradicts the formal logic and creates problems for law enforcement practice is the concept of the enterprise as a business entity.

Analysis of the provisions of Articles 62, 55 of the Commercial Code of Ukraine gives grounds to conclude that there are no features of the enterprise as a legal form of the business entity, and the criterion for its separation from other economic organisations, objectified in Part 2 Article 55, is unsuitable due to the lack of such features. The Commercial Code of Ukraine does not have a clearly structured system of subjects (participants) of economic relations. Provisions that determine the specific features of the subjective composition of economic relations have numerous defects in rule-making techniques, are contradictory and partially do not correspond to the formal logic.

REFERENCES

- [1] Shcherbyna, V.S. (2008). *Subjects of economic law*. Kyiv: Yurinkom Inter.
- [2] Povar, P.O. (2009). Legal regulation of liquidation of enterprises in Ukraine. (Candidate thesis, KNUTSH, Kyiv, Ukraine).

¹ Laws of Ukraine No 987-XII "On Freedom of Conscience and Religious Organizations". (1994, April). Retrieved from <https://zakon.rada.gov.ua/laws/show/2210-14#Text>

- [3] Doroshenko, L.M. (2002). Legal regulation of termination of a business entity. *Bulletin of the Khmelnytsky Institute of Regional Management and Law*, 2. Retrieved from <http://www.univer.km.ua/visnyk/55.pdf>.
- [4] Shevchenko, Ya.M. (Ed.). (2009). *Subjects of civil law*. Kharkiv: Yaroslav the Wise Kharkiv University of Law.
- [5] Kucherenko, I.M. (2004). *Organizational and legal forms of legal entities of private law*. Kyiv: Institute of State and Law. V.M. Koretsky NAS of Ukraine.
- [6] Dovgert, A.S. (2016, November). Some remarks on the formation of the system of legal entities in Ukraine. *Legal entities of public law: participation in civil turnover (Matveyev civil readings): materials of the international scientific-practical conference* (pp. 18-23). Kyiv: Belotserkivskdruk LLC.
- [7] Kuznetsova, N.S., & Suleimenov, M.K. (2018). *Legal regulation of entrepreneurial activity in the post-Soviet period*. Kharkiv: Pravo.
- [8] Glinkowska, B., & Chebotarov, V. (2019). Establishing a business in Ukraine—the initial regulatory organizational and legal aspects for Polish entrepreneurs. *Comparative Economic Research*, 22(1), 75-86.
- [9] Shashkova, A.V., Polovchenko, K.A., & Volevodz, A.G. (2019). Questioning state corporations as special forms of legal entities. *International Journal of Economics and Business Administration*, 7, 186-203.
- [10] Vasyunina, M., & Lipatova, I. (2019). On the content of social entrepreneurship. *Studies in Computational Intelligence*, 826, 511-522.
- [11] Haldar, S. (2019). Towards a conceptual understanding of sustainability-driven entrepreneurship. *Corporate Social Responsibility and Environmental Management*, 26(6), 1157-1170.
- [12] Salinas, A., Ortiz, C., & Muffatto, M. (2019). Business regulation, rule of law and formal entrepreneurship: Evidence from developing countries. *Journal of Entrepreneurship and Public Policy*, 8(2), 254-271.
- [13] Assetova, G., Kubeyev, Y., & Kizdarbekova, A. (2018). Problems of legislation systematization in the sphere of entrepreneurial activity. *Journal of Advanced Research in Law and Economics*, 9(7), 2239-2247.
- [14] Wood, M. (2018). Mapping EU agencies as political entrepreneurs. *European Journal of Political Research*, 57(2), 404-426.
- [15] Miroshik, S.V., Linkin, V.N., Nemykina, O.E., Tutinas, E.V., & Ostroukhova, K.N. (2018). Legal encouragement of entrepreneurial activity. *European Research Studies Journal*, 21, 296-302.
- [16] Vasylieva, V.A., Zelisko, A.V., & Zozuliak, O.I. (2018). Cooperatives in Ukraine: Applicative peculiarities of legal integration up to the EU standards. *Journal of Advanced Research in Law and Economics*, 9(5), 1789-1797.
- [17] Kucherenko, I.M. (2004). *The concept and main features of a legal entity*. *Almanac of Law*, 2011, 2, 34-37.
- [18] Kravchuk, V. (2000). Change of owner (founder) of a private enterprise. *Business, Economy and Law*, 1, 50-53.
- [19] Bochkov, P.V. (2020). Economic and legal status of enterprises of religious organizations. *Comparative and Analytical Law*, 1. Retrieved from http://pap.in.ua/1_2020/58.pdf.

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