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Legal Status of the Business Entities in Ukraine in the Context of Changes in Current Legislation

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Abstract

This study is relevant since currently, Ukraine undergoes the reformation and revision of private legislation, considering the European vector of development of the state. The problems of improving the status of legal entities as business entities were also considered. Therefore, the purpose of this study is to examine the legal status of business entities in Ukraine in terms of changes in legislation and to develop on its basis the original view of this issue. In accordance with the purpose of the study, the following methods are used: historical, systems analysis, generalisation, comparative and functional methods of scientific knowledge. The reform of civil legislation is under study and its necessity in the area of solving problematic issues of legal regulation of business entities in Ukraine was determined. It was stated that civil law eliminates the full liability of full members for the obligations of a general partnership. Ways to improve the legal mechanisms for regulating relations with the involvement of business entities and their participants were investigated. Moreover, the paper provides recommendations for amendments to the legislation to address the issues identified in the study. Provisions and conclusions of the study can be used in the preparation of relevant textbooks, manuals, and comments on regulations governing the status of the business entity and in the activities of such entities to address certain issues regarding their status

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Introduction

The business entities, as the participants in civil relations, play one of the key roles in the national economy, and the business entity category not only provides the legal personality but also allows increasing the effectiveness of the legal regulation mechanism for a number of associations of the individuals [1–3]. As of today, there is a dualism in the regulation of private relations [4]. This fully applies to the business entities, which in turn leads to the conflicts of legal regulation (for example, different approaches to the category of “enterprises” in the Civil and Economic Codes of Ukraine, which impacts the scope of responsibility of the members of a production cooperative, etc.) [5].

The normative definition of the concept of a business entity is given in Article 80 of the Civil Code of Ukraine¹ as an organisation established and registered in accordance with the procedure established by law. Such a law regulating the procedure for establishing entities with the status of business entities is the Law of Ukraine No. 755 “On State Registration of Legal Entities, Natural Persons-Entrepreneurs, and Public Establishments”². Therewith, the certain types and organisational and legal forms of business entities are given attention at the level of special laws, in particular, the laws: Law of Ukraine No. 1576-XII “On Business Associations”³, Law of Ukraine No. 514-VI “On Joint Stock Companies”⁴, Law of Ukraine No. 2275-VIII “On Limited and Additional Liability Companies”⁵, Law of Ukraine No. 1087-IV “On Cooperation”⁶, Law of Ukraine No. 819-IX “On Agricultural Cooperation”⁷ etc. The norms of the Economic Code of Ukraine are also devoted to the status of business organisations that have the rights of business entities⁸. In particular, at the level of the Economic Code of Ukraine, the status of state unitary and municipal unitary enterprises is regulated, while the legal regimes of property, economic management, and operational management rights are defined.

The concept of updating the Civil Code of Ukraine is also devoted to improving regulations on the business entities. Thus, it is proposed: to add an exhaustive list of organisational and legal forms of the business entities to the Civil Code of Ukraine⁹ (the Civil Code of Ukraine, as a fundamental act of private law which regulates the general provisions on business, should determine an exhaustive list of its organisational and legal forms

while abandoning the archaic structures of the business entities (especially enterprises)); to return the general provisions on limited liability companies to the Civil Code of Ukraine and separately indicate the existence of special regulation in the Law of Ukraine No. 2275-VIII “On Limited and Additional Liability Companies”¹⁰; to clarify the content of the sub-clause on the involvement of the state, the Autonomous Republic of Crimea, and territorial communities in the civil relations [6–8].

According to O. Ovcharenko *et al.* [7], the defining feature that characterises the legal status of the business entity is its economic competence, which is realised based on property rights, economic management rights, and the right of operational management in accordance with the definition of this competence in law. W.S. Dodge [3] considers the legal status of the business entity as constitutional and distinguishes the legal status of certain branches of law, namely civil procedure, criminal procedure, and administrative procedure law. According to V.I. Tsikalo [5], the problem of the legal status of business entities in Ukraine is that it is characterised as a collective type of rights, freedoms, and responsibilities of business entities. D. Palombo [4] notes that civil law tends to develop general principles of legal regulation of legal entities, while their general structure must meet the purpose of creation, which is quite sufficient in their division into business and non-business companies, leaving features at the level of self-regulation and regulatory influence. In this aspect, N.V. Trusova *et al.*, examining the agreements on making contributions by the participants of business entities, emphasised that the agreement between the founders of a limited liability company is the basis for making contributions by them, it is valid until its proper execution and after the state registration of this company [8].

Therewith, in the course of improving legal mechanisms for regulating relations involving business entities and their participants, it is necessary to provide that after the established limited partnership enters into an agreement with the contributors on mutual rights and obligations, it is subject to notarisation. Despite this, in the context of changes in current legislation, these issues are relevant. Thereby, the originality of the work is that the results of the study fill to some extent the gap in the science of civil law regarding the status of the business entity.

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

²Law of Ukraine No. 755-IV “On State Registration of Legal Entities, Natural Persons-Entrepreneurs and Public Formations”. (2003, May). Retrieved from <https://zakon.rada.gov.ua/go/755-15>.

³Law of Ukraine No. 1576-XII “On Business Associations”. (1991, September). Retrieved from <https://zakon.rada.gov.ua/laws/show/1576-12#Text>.

⁴Law of Ukraine No. 514-VI “On Joint Stock Companies”. (2008, September). Retrieved from <https://zakon.rada.gov.ua/laws/show/514-17/conv#Text>.

⁵Law of Ukraine No. 2275-VIII “On Limited and Additional Liability Companies”. (2018, February). Retrieved from <https://zakon.rada.gov.ua/laws/show/2275-19#Text>.

⁶Law of Ukraine No. 1087-IV “On Cooperation”. (2003, July). Retrieved from <https://zakon.rada.gov.ua/laws/show/1087-15#Text>.

⁷Law of Ukraine No. 819-IX “On Agricultural Cooperation”. (2020, July). Retrieved from <https://zakon.rada.gov.ua/laws/show/819-20#Text>.

⁸Economic Code of Ukraine. (2003, January). Retrieved from <https://zakon.rada.gov.ua/laws/show/436-15>.

⁹Civil Code of Ukraine, op. cit.

¹⁰Law of Ukraine No. 2275-VIII “On Limited and Additional Liability Companies”, op. cit.

The purpose of this study is to examine the legal status of business entities in Ukraine in the context of changes in current legislation.

Materials and Methods

The methodological basis of the study was a set of general and special scientific methods, techniques, and tools of scientific knowledge, and their comprehensive application aims to achieve the goals and objectives of the study. The theoretical basis of this study was the papers devoted to issues of legal regulation of business entities. The normative and legislative base of the study consisted of materials of the relevant public authorities¹⁻³, statistical data⁴⁻⁶, and generalisations of practice contained in the materials of periodicals [7-9].

The historical method was used in the analysis of the establishment and development of legislation on the legal status of the business entity. The comparative legal method was used in comparing the relevant legislation of Ukraine and other countries to formulate proposals for improving domestic legislation, considering foreign experience. Generalisation was used in the study of the practice of reforming and updating private legislation, which considers the European vector of state development.

Using the methods of induction and deduction and the axiomatic method, the main aspects of the legal status of the business entity were specified. Through the functional method, recommendations for amendments to the legislation were prepared to address the problems identified in the study. The application of systems analysis allowed systematising and refining the provisions on the main elements of the status of the business entity.

Results and Discussion

Business entities play a vital role and perform important functions. They are not only one of the main taxpayers and the employers in Ukraine, but also a means of attracting investment into the country. Therefore, the issue of improving the legal status should be given due attention. Many of the proposals that are covered in the Concept of Updating the Civil Code of Ukraine (except, probably, for the proposal to consolidate the status of business entities under the public law for the state, the Autonomous Republic of Crimea and territorial communities) should be agreed on⁷. Therewith, when reforming

the civil legislation of Ukraine, it is advisable to pay attention to the following aspects in the context of the business entities status:

1. It is advisable to make changes that would clearly provide for the need to adopt a special law that would provide for the specific features of the legal status of business entities under public law. As of today, the legal status of the business entities of public law is ambiguously defined. As a result, for example, PJSC "Oschadbank" is a business entity of private law, although the state guarantees by law the deposits of individuals in this bank; the Concern Ukroboronprom is a business entity of public law (although there have been some attempts to change this situation), any utility company (including one that is engaged, for example, in cleaning adjacent territories) is a business entity of public law.

2. It is necessary to fix the requirements for notarising the founders' signatures on the constituent documents of the business entities at the level of the Civil Code of Ukraine, which is an effective mechanism for preventing abuse. Those requirements already exist in other regulations, but given the legal force and level of stability of the Civil Code of Ukraine, they should also be provided for in the code⁸.

3. Considering that, according to Article 83 of the Civil Code of Ukraine, the business entities can be founded not only in the form of companies and institutions but also in the other forms established by law; the lack of legislative technology creates the erroneous phrases in Article 88 of the Civil Code of Ukraine, such as: "The company Charter specifies..." and "The founding agreement of the company...". Therefore, the word "companies" should be replaced with "business entities". In addition, it should be detailed and provided that the recognition by the court of the constituent documents of a business entity as invalid does not affect the validity of any obligations assumed by this business entity that arose before the relevant court decision entered into legal force⁹.

4. As of today, the requirements for a commercial (corporate) naming are actually defined only by the Company regulations as of 1927, which is unacceptable. In the Civil Code of Ukraine, it is advisable to provide for the need to adopt a special law¹⁰.

5. The changes should be made that would provide for an approach according to which any public authorities, except for the court, are not allowed to make decisions on the termination of business entities.

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

²Law of Ukraine No. 755-IV "On state registration of legal entities, natural persons-entrepreneurs and public formations". (2003, May). Retrieved from <https://zakon.rada.gov.ua/go/755-15>.

³Law of Ukraine No. 1576-XII "On Business Associations". (1991, September). Retrieved from <https://zakon.rada.gov.ua/laws/show/1576-12#Text>.

⁴Law of Ukraine No. 514-VI "On Joint Stock Companies". (2008, September). Retrieved from <https://zakon.rada.gov.ua/laws/show/514-17/conv#Text>.

⁵Law of Ukraine No. 2275-VIII "On Limited and Additional Liability Companies". (2018, February). Retrieved from <https://zakon.rada.gov.ua/laws/show/2275-19#Text>.

⁶Law of Ukraine No. 1087-IV "On Cooperation". (2003, July). Retrieved from <https://zakon.rada.gov.ua/laws/show/1087-15#Text>.

⁷Civil Code of Ukraine, op. cit.

⁸*Ibidem*, 2003.

⁹*Ibidem*, 2003.

¹⁰*Ibidem*, 2003.

6. Article 107 of the Civil Code of Ukraine should provide for effective mechanisms for protecting the rights and interests of the creditors of a reorganised business entity, considering the need to ensure the stability of civil turnover and the legitimate interests of the debtor¹.

7. It is advisable to consolidate the approach according to which the allocation is a way to reorganise business entities. As of today, this approach is found in many regulations (for example, in the Law of Ukraine "On Agricultural Cooperation", Law of Ukraine "On Banks and Banking Activities"², etc.

8. It should be provided that the participants in full companies (full participants in limited partnerships) can be individuals with full civil legal capacity and/or business legal entities.

9. It is advisable to enshrine the need for notarisation of the founding contracts of the full and limited partnerships, which is conditioned by the scope of responsibility of the parties to such contracts based on the results of their signing.

10. It is necessary to legislatively expand the arsenal of mechanisms for managing full and limited partnerships, consolidating the possibility of entrusting their current activities management to the third parties.

11. It is necessary to introduce an approach according to which the members of a production cooperative bear the subsidiary responsibility for the obligations of the cooperative in the amounts and in accordance with the procedure established by the cooperative's charter. As of today, the different regulations provide for the different rules. This wording would introduce the uniform principles for determining the scope of responsibility of the production cooperatives members, etc.

In addition, civil law eliminates the liability of full members for the obligations of a general partnership, as it does not impose restrictions on participation in a general partnership of companies (in particular, limited liability companies) [6–8]. One way to solve this is to consider the proposals of individual researchers to introduce joint and several liability for the obligations of the general partnership for officials of the participants – business entities [9–11]. The other options for resolving those issues include an addition to the current legislation of Ukraine of one of the following provisions: a) the minimum amount of the authorised capital of business entities-participants of full partnerships (full participants of limited partnerships); b) subsidiary liability with all their property for the obligations of full/limited partnerships of individuals-participants of business entities, directly or indirectly related to the

relations of involvement with such full/limited partnerships; c) subsidiary liability with all their property for the obligations of full/limited partnerships of the ultimate beneficial owners of business entities that are the participants of such partnerships; d) the founders (participants) of full/limited partnerships may be the business entities exclusively in the organisational and legal form of full or limited partnerships, etc.^{3,4};

Therefore, it is necessary to increase the role and the importance of contractual regulation of the relations between the participants of different business entities. Nevertheless, the legal literature [12–15] still continues to discuss the relevant contracts. According to V.I. Tsikalo, the subject of the agreement between the participants (shareholders) of a business company is not the obligations of the parties or even the rights that belong to them, but the methods of exercising the rights of participants in the business company [9]. Therewith, any agreement on exercising the rights and obligations between the founders (participants) of the business companies by its nature and purpose should: firstly, be characterised as civil one; secondly, further specify the features of exercising the rights and obligations to establish or terminate business companies, involvement in such business companies, the order for the transfer of shares (its part) in the authorised capital of the participant to the others, the civil and legal consequences of failure to fulfill the obligations on making contributions to the authorised capital, including in the form of refunding damages, penalties, etc.; thirdly, be aimed at the emergence, change, or termination of the civil rights and obligations of the founders (participants) of the business companies [10].

As of today, the issues of the procedure for managing business entities in case of the death of its participants before their entry and registration of inheritance remain unresolved. Similar issues were the subject of consideration in different court cases. According to the paragraph 2.30 of the Resolution of Plenum of Supreme Economic Court of Ukraine No. 4 as of 02/25/2016 On Certain Issues of Dispute Resolution Practice Arising from Corporate Legal Relations, before deciding on the entry (acceptance) of heirs (legal successors) of a deceased (liquidated) participant, the competence of the general meeting of the participants is determined without considering the share in the authorised capital that belonged to the deceased (liquidated) participant. Therefore, in this case, when establishing the competence of the general meeting of participants, it is necessary to consider the votes of other members of the company, which without votes fall on the deceased

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

²Law of Ukraine No. 819-IX "On Agricultural Cooperation". (2020, July). Retrieved from <https://zakon.rada.gov.ua/laws/show/819-20#Text>.

³Resolution of the Plenum of the Supreme Economic Court of Ukraine No. 4 "On Some Issues of the Practice of Resolving Disputes Arising from Corporate Relations". (2016, February). Retrieved from <https://zakon.rada.gov.ua/laws/show/v0004600-16/conv#Text>.

⁴Resolution of the Grand Chamber of the Supreme Court No. 917/1338/18 (2018, November). Retrieved from https://verdictum.ligazakon.net/document/101829986?utm_source=juriga.ligazakon.ua&utm_medium=news&utm_content=jl03&_ga=2.20556792.1525163594.1640690978-239597050.1640690.

(liquidated) participant and together constitute 100% of votes to be considered when determining the quorum¹. A similar position is applied in a number of court decisions, in particular, when making decisions of the Civil Court of Cassation as a part of the Supreme Court as of 02/14/2018 in the case No. 740/2194/15-ts and the decisions of the Economic Court of Cassation as a part of the Supreme Court as of 11/05/2019 in the case No. 927/242/19 and as of 08/08/2018 in the case No. 911/3215/17.

However, the Grand Chamber of the Supreme Court, adopting a resolution as of 11/02/2021 in case No. 917/1338/18, deviated from this legal position, indicating that “the decision to refuse to accept an heir to the company is made by more than 50% of the total number of votes of the company’s participants, including votes that fall on the share of the participant who died, although this participant (their representative) does not take part in voting”². This position of the Grand Chamber of the Supreme Court is disputable since it is difficult to ensure the activities of the company’s highest management body

when resolving other, sometimes equally important issues related to the activities of such a company.

Conclusions

The main aspects in the context of the status of business entities in reforming the civil legislation of Ukraine were examined. It was indicated that the civil legislation eliminates the full liability of full members for the obligations of a full company since it does not establish the restrictions on the involvement of business companies in a full partnership. In addition, it was stated that it is necessary to increase the role and the importance of contractual regulation of the relations between the participants of different business entities. Moreover, this study provided recommendations for amendments to the legislation.

The recommendations presented in this study do not cover all the issues of the legal status of business entities in Ukraine in terms of updating legislation. Promising areas of development of the issue should be based on managing a business entity with a single participant in the event of the death of such a participant.

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¹Resolution of the Plenum of the Supreme Economic Court of Ukraine No. 4 “On Some Issues of the Practice of Resolving Disputes Arising from Corporate Relations”. (2016, February). Retrieved from <https://zakon.rada.gov.ua/laws/show/v0004600-16/conv#Text>.

²Resolution of the Grand Chamber of the Supreme Court No. 917/1338/18 (2018, November). Retrieved from https://verdictum.ligazakon.net/document/101829986?utm_source=jurliga.ligazakon.ua&utm_medium=news&utm_content=jl03&_ga=2.20556792.1525163594.1640690978-239597050.1640690.

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Правовий статус суб'єкта підприємництва в Україні в умовах змін чинного законодавства

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Анотація

Актуальність дослідження зумовлена тим, що нині в Україні відбувається процес реформування та оновлення приватного законодавства з урахування європейського вектора розвитку держави. У зв'язку з цим нагальністю вирізняються проблеми вдосконалення статусу юридичних осіб як суб'єктів підприємництва. Метою наукової статті є дослідження правового статусу суб'єктів підприємництва в Україні в контексті змін законодавства й вироблення на його основі авторського бачення щодо цього питання. Відповідно до поставленої мети дослідження використано історичний, порівняльно-правовий і функціональний методи, а також методи системного аналізу, узагальнення й наукового пізнання. Визначено ключові аспекти статусу суб'єктів підприємництва в межах реформування цивільного законодавства України. Проаналізовано реформу цивільного законодавства в контексті вирішення проблемних питань правового регулювання суб'єктів підприємництва в Україні. Запропоновано шляхи вдосконалення правових механізмів регулювання відносин за участю суб'єктів підприємництва. Доведено потребу в підвищенні ролі й значення договірного регулювання відносин між учасниками різних суб'єктів господарювання. Сформульовано рекомендації щодо внесення змін до законодавства для вирішення визначених у межах дослідження проблем. Положення та висновки роботи можуть бути використані під час підготовки відповідних підручників, навчальних посібників, коментарів до нормативно-правових актів, що визначають статус суб'єкта підприємництва, а також у діяльності суб'єктів господарювання під час вирішення питань щодо їх статусу

Ключові слова:

правовий режим власності; цивільні відносини; підприємство; товариство; кооператив