

THE DEFINITION OF BUSINESS ENTERPRISE OVERVIEW OF LEGAL AND ECONOMIC APPROACHES

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Abstract

The importance of establishing common legal definition of business enterprise is not merely a subject of legal theory. It raises the problem of the legal theory enterprise or, simply, who is the subject of corporate law, enterprise, entrepreneur or the society (company)?! A unified approach or common definition of business enterprise is not established. In general, legal writers agree on the basic, general outlines, but the diversity begins with every suggestion of more precision. The purpose of this article is to overview all the approaches to the concept of enterprise, discuss legislative and economic suggestions in this field and, in the end, to offer a unified definition of the enterprise.

Keywords: The definition of business enterprise

Introduction

The importance of establishing common legal definition of business enterprise is not merely a subject of legal theory. In order to establish a legal system on the basis of the concept of the enterprise one must first give that concept a **legal definition**, which seems to be quite difficult, as is shown by the diversity and lack of precision of the definitions advanced by legal writers or the legislature [17]. As discussed below, in general, legal writers agree that enterprise is formed by establishment of means of production with a permanent organization. There is an economic basis as well. The enterprise contains both, material and human components. As the unified approach is achieved with these general outlines, the diversity begins with diving deeper. The supporters of the legal theory of enterprise admit that the legal concept is only at an emergent stage. It is quite problematic to put the legal concept of enterprise together with the traditional concepts of business assets and the company [17].

It is very interesting that Austria implemented the theory of enterprise into legislation. For that purpose the thorough analysis of the Austrian reform of Commercial law is very important. Must be mentioned that Austria is almost the only country suggesting legislative detailed definition of enterprise.

The purpose of this article included overview of all the approaches to the concept of enterprise, discussion legislative and economic suggestions in this field and, in the end, to offer a unified definition of the enterprise.

The research is based on general scientific methodology. Abstractive-logical methodology is broadly used which includes analysis and synthesis, induction and deduction. Comparative legal methodology of research is also applied.

The article consists of the introduction, two main chapters and the conclusion. The first chapter overviews concept of business enterprise in legislation and economic theory. The second chapter defines approaches of the legal doctrine. The conclusion suggests the definition of business enterprise based on the conducted research.

Business Enterprise in Legislation and Economic Theory

The process of defining legal definition of enterprise is highly important for the purpose of distinguishing between entrepreneurship and enterprise since the activity of enterprise is closely linked with the business activities or entrepreneurship. Also, it is important to differentiate the definition of entrepreneur from the enterprise. The concept is closely related with the problem of deciding whether the enterprise is the subject or the object of corporate law. Under the “law of entrepreneurs of Georgia” the question formally is solved, since the name of legal act offers entrepreneurs as a subject of corporate legislation, but the formal answer is not the clarification. In legal relationships the enterprise is the subject of law, since it participates in transactions on behalf of itself, independently, same way as it may be an object of law, since the transaction might be concluded on the enterprise. The “law of entrepreneurs of Georgia” does not offer the definition of enterprise, though before 2008, the law declared that enterprise was a subject of rights and obligations under this law.

In the light of all the above, it is clear that in the process of elaboration of the definition of enterprise the definitions of entrepreneur and business enterprise, company and business enterprise must be distinguished from each other.

The definition of business enterprise always has an economic flavor, since the enterprise is a subject of corporate law and the main player of macroeconomics. It is also believed that the classification of enterprise as a pecuniary complex starts from economic theory. For this reason, it is important that the definition of business enterprise was discussed in connection with economic definition.

Part of Georgian authors consider that enterprise is a universal form of organization of entrepreneurship. It is the subject and the object of corporate law [7]. This explanation is too vague though and does not suggest all the key elements.

As it comes to economic definition of enterprise, it is hard to come across to any unified description of Georgian authors. All the researchers suggest different classifications and diverse terminology [1, 3, 6, 8]. Georgian researches of economic theory do not normally use the term “enterprise”, instead, “business” or “firm” is commonly used. Those definitions are suggested as synonyms to enterprise. Some of them also represent “entrepreneurial enterprise” which must be rough translation of business enterprise [8]. The determinant “entrepreneurial” must serve as indicator of the purpose of receiving income from business activities. It is also important that the use of terminology mentioned above is quite contradictive. For example, I. Meskhia uses term “enterprise” and indicates term “firm” as a synonym while explaining that enterprise is a subject of economic relationships under the single capital and firm is a subject of economic relationships in the frame of different “autonomic” capitals [8].

All the referred authors classify enterprise by size, main activities, forms of property and organizational-legal forms that are in complete accordance with the Article 2 of the “Law on Entrepreneurs of Georgia.”

The main criteria suggested in the economic theory are as follows:

- Production of goods or services;
- Independence;
- Purpose of getting profits;
- Registration in accordance with legislation (additional requirement);
- Organization and autonomic governance;
- Presence of employees and working facilities.

If we return to legal definition of business enterprise, we shall figure out that some of the above classifications are agreed to be determinants of business enterprise for the legal doctrine or legislation.

In general, legal writers consider that an enterprise is formed by establishment of means of production with a permanent organization. As a basis, surely serves the economic concept of a unit of production, transformation or distribution. The enterprise contains both material and human components [16].

The definition of an enterprise normally is not suggested by the legislation and is discussed in doctrine or, rarely, submitted by case-law, though few exceptions still are found.

First of all the legislation of Italy must be mentioned. The Article 2082 of the Civil Code defines the person who runs an enterprise as someone who professionally carries on an economic activity devoted to the production or exchange of goods or service [16]. Clearly, this definition is close to economic point of view and, as we find below, the main elements of legal approach are omitted.

For the purposes of thorough research, must be mentioned that Russian Civil Code also suggests the definition of enterprise, but this description has so few in common with normal corporate law standards, that is of almost no assistance, but still, it might be interesting to indicate this concept as well. So, the Article 132 of CC of Russian Federation offers that enterprise, as an object of law, is a unification of property that is used for the purposes of entrepreneurial activities. The enterprise is a real estate, entirely or partly the object of the contract of sale, mortgage, loan or other agreements that rise property rights.

Russian doctrine offers that the enterprise, defined under the Article 132 of CC, is a particular type of property, in contrast to the enterprise subject of private law – legal person [10]. Apparently, this distinction suggests that the enterprise, as an object of law is property, while the enterprise as a subject of law is assimilated with the definition of legal person. The approach is not exactly precise, since the concept of legal person determines the legal capacity of society in private law, while the enterprise is wider and more complex institution, participating in wide range of private and public legal relationships [9].

While speaking of legal definition of the business enterprise, most attention should be paid to Business Enterprise Code of Austria as it suggest the most clear, detailed legislation definition of enterprise.

The history of codified Austrian commercial law is strongly linked to German commercial law. The 1861 General German Commercial Code (Allgemeines Deutsches Handelsgesetzbuch - “ADHGB”) of the German Federation (Deutscher Bund) was implemented in all of its member states, including Austria. After the establishment of the German Reich in 1871 (which did not include Austria), new codes were drafted. This led to the German Commercial Code of 1900 (Handelsgesetzbuch – “HGB”) which replaced the ADHGB in the German Reich but not in Austria. However, in 1938 the occupation of Austria by Nazi Germany led to the extension of the HGB to the Austrian territory. Since the HGB had not been part of Nazi ideology, it was not repealed after the Second World War. The German and Austrian Commercial Codes were, therefore, with very few exceptions, identical until 1998 [17].

In 1998, the German commercial Code was changed that also resulted in commercial reform in Austria. The amendments entered into force form August 1, 2007 and are supposed to be bolder than the German reform. It will not only change some details of the HGB, but will replace the term “merchant” (Kaufmann) with the term “business enterprise” (Unternehmen), and will thus rename the Commercial Code (Handelsgesetzbuch) the Business Enterprise Code (Unternehmensgesetzbuch - “UGB”). In the explanatory notes of the Austrian UGB, it is said that the regulatory shift from “merchants” to “business enterprises” is inspired by consumer protection rules which also address businesses dealing with consumers [17].

The objective of the reform was to modernize, simplify and deregulate Austrian commercial law and to eliminate existing inconsistencies between general civil law, commercial law and consumer protection law [15].

As the reform of corporate law in Austria receives not only compliments, but great deal of criticism from certain authors (see, for example, Mathias M. Siems [17]), all we need to discuss in this article, is the definition of business enterprise which is provided in the Article 1.(2) of the new UGB. A business enterprise is defined as an **enduring organization of independent economic activity, regardless of whether its purpose is the realization of profit or not.**

Thus, non-profit legal persons are also included in the definition of business enterprise. This approach is justified with the consideration that they possess the same level of professionalism and bargaining power as other businesses [15]. With regard to the liberal professions, such as lawyers, tax advisers and physicians, as well as with regard to agricultural and forestry enterprises, it is stated that they do not belong to these business enterprises (ss.2, 3 of the UGB). They have, however, the possibility of registering in the business register and, hence, of opting into the provisions of the UGB (s.4 of the UGB). Finally, business partnerships and companies are always deemed to be enterprises [15, 17].

After the comparison of Italian and Austrian approach, it is clear that both legal systems consider the economic activity as a characteristic of enterprise. “Economic activity” in this context includes all the measures in connection with governance of the enterprise, realization of profit or achieving the purposes of the legal entity. Austrian legislation goes further and offers more detailed determination of business enterprise. Independence is a very important characteristic that includes both independence of governance and independence of property. Also, the activity must be enduringly organized. The enterprise must have an organizational form and structure, system of decision making and option of making decisions independently.

In the process of evaluation of the reform in Austria, critics believe that new UGB offers more narrow approach than new Commercial Code of Germany, not taking into account globalization of international trading [17].

For that matter must be underlined that new UGB broadens the concept of enterprise in contrast with the German Commercial Code as it discarded the definition of “small business” or “small merchant” as offered previously.

The supporters of the Austrian reform state that the reform considers commercial law (Handelsrecht) to be a concept of a law which is tied to merchants or traders. It is argued that today there is no distinctive class of merchants, such as those who were to be found in the merchant guilds in medieval states. Furthermore, the terms “commercial law” and “merchant” are claimed to be too narrow and misleading. Since, literally, these words refer to trade only, other types of business activity, such as the supply of services, would not be included [17], but to be honest, when it comes to the German Commercial Code and UGB, the discussion is more about the terminology rather than the concept. It is also clear, that after the reform, Austria is a supporter of the “business enterprise theory” in contrast with, for example, France or Germany [16].

The Definition of Business Enterprise in Legal Doctrine

As already mentioned above, the “Law on Entrepreneurs of Georgia” does not suggest the definition of enterprise, but the Article 2.3 states that Society of Solidary Responsibility, Commandite society, Limited Liability Company, Joint Stock Company and Cooperative are enterprises with legal personality. So, it seems that enterprise is associated with organizational-legal forms of entrepreneurship. The approach is completely opposite in doctrine.

As already stated, Society is not a synonym to enterprise, nor is the legal entity. Legal writers differentiate enterprise and subject of law carrying the enterprise. Enterprise does not inevitably include entrepreneurship, for that reason, full assimilation of the enterprise and the subject carrying the enterprise could not be achieved [2]. The enterprise enjoys all the characteristics of legal person in legal relationships, since the legal person is the subject carrying the enterprise. Society (company) also serves as a subject carrying the enterprise.

Part of Georgian legal researchers suggest that enterprise is organized-economic unity of persons and property [2]. The definition is not fully complete though. Below some additional details should be suggested.

First and significant element of enterprise is **organization**. The criterion includes organization of activities, organized structure, bodies of corporate governance defined by the charter of the society.

The next component is field of **economic activities**. The approach of Austrian law, that bring together commercial enterprises and non-profit legal persons under the definition of business organizations must be wrong. The concept of enterprise includes entrepreneurship that is the economic category and bears part of commercial activities, focused on realization of profit, while the non-profit organizations carry their social goals and do not necessarily need to be enterprises, so the element closely linked with economic activities is the **orientation on realization of profit**.

The **independence** of activities and of property is an element of enterprise. The independence of property in this context does not mean limitation of liability but having the independent property, assets and measures to carry the economic activities.

The part of conception of enterprise is as well existence of **employees and working facilities**. Though in case of small companies or individual entrepreneurs, employees under contract may not be present at all.

As the necessary element of enterprise are considered **obligations** under contract law. Under this criterion unify the claims with third parties, partners as well as obligations inside the company.

Last but not the least element is **brand name** which is discussed separately by some authors [9], though it comes under the definition of property.

The Austrian approach is interesting in the part of corporations as they always automatically are considered as business enterprises following their legal form itself. The reason is quite obvious in that case, the economic activity of Limited Liability Company or Joint Stock Company could not and must not be profit-oriented.

Conclusion

To summarize all the above, the following unified legal definition of business enterprise must be suggested: **endurably organized independent economic-legal unity of persons, property, obligations and economic activities oriented on realization of profit**. The non-profit organizations must not be considered as business enterprise. They carry legal personality and have their mostly social goals but their economic activities are not oriented on realization of profit and this last criterion is the part of definition of business enterprise.

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