**SOME PROBLEMS**

**OF COMMERCIAL LAW IN UKRAINE**

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**Abstract:** *The paper is devoted to the disclosure of certain aspects of recodification in Ukraine, some existing problems of commercial law, the conflict of norms between the Commercial Code of Ukraine and the Civil Code of Ukraine. In 2020 the Concept of Civil Legislation Reform was adopted in Ukraine. The Concept states that the systematic renewal of the Civil Code of Ukraine as a whole is possible only if the Commercial Code of Ukraine is repealed because the latter does not meet the parameters of the acts governing business relations, which by their nature are primarily private.*

*The manuscript explains the current problems of commercial as well as civil law regulation of business relations for both: 1) foreign scholars dealing with civil and commercial law; 2) foreign investors (including from EU countries) who are already conducting economic activity in Ukraine or plan to invest in the Ukrainian economy. Especial attention is given to such issues like types of ownership, penalties for obligations, differences in legal capacity, difference of approaches to the system of legal entities, existence of some archaic legal forms of entrepreneurial activity etc.*

*The author emphasizes that undoubtedly the Commercial Code of Ukraine as well as the Civil Code of Ukraine need some updating. There is an urgent need to systematize the existing organizational and legal forms of legal entities, to renew the basics of civil law regulation in Ukraine.*

*It is explained in the paper while in most neighboring jurisdictions steps are being taken to systematical updating of commercial codes (including expanding the scope of its legal regulation), in Ukraine steps are being taken to eliminate the commercial code. This seems completely unacceptable, harms the legal regulation of business relations in Ukraine significantly, slows down the progressive development of Ukraine's economy.*

*The analysis of commercial codes abroad shows that there is no single approach to the list of legal constructions that should form the basis of the relevant code. All, without exception, codified acts of this type are characterized by the presence of special institutions that from the point of foreign lawyer’s view or current trends in private law, may seem do not meet certain standards.*

***Keywords:*** *recodification, Ukraine, civil law, commercial law, company law, Commercial Code of Ukraine, Civil Code of Ukraine*

**Introduction**

On July 17, 2019, the Cabinet of Ministers of Ukraine adopted a resolution under №650 "On the establishment of a working group on recodification (updating) of civil legislation of Ukraine", which formed a working group on recodification of civil legislation)[[1]](#footnote-1).

The main tasks of the working group were identified by the government: 1) conducting a comprehensive analysis of the existing civil legislation of Ukraine and identifying areas of private and commercial law relations that need to be brought into line with global trends in private law; 2) study of the experience of European countries on recodification (updating) their civil and commercial legislation; 3) elaborating of proposals for recodification (updating) of the civil legislation of Ukraine.

This study is devoted to the disclosure of certain aspects of recodification, some existing problems of commercial law, the conflict of norms between the Commercial Code of Ukraine[[2]](#footnote-2) and the Civil Code of Ukraine[[3]](#footnote-3).

Ukraine has adopted a different way of solving the problem of dualism in the practice of regulating commercial and corporate relations. In 2004, two codified acts were adopted simultaneously: 1) the Civil Code of Ukraine, which included at the same time the norms of contractual, non-contractual and inheritance law; 2) Commercial Code of Ukraine, which contained rules governing not only legal relations within commercial companies and business agreements, but also a significant array of rules relating to property of economic entities, general provisions on economic obligations, liability for economic offens, special features of legal regulation in some sectors of economy, foreign economic activity, special regimes of carrying out economic activity and so on.

The dualism of law is a legal solution that is typical in many EU states, as well as in some post-Soviet countries. Some examples of the coexistence of both civil and commercial (which is more than a codification of norms on companies and associations) codes will be given below.

The adoption of two codes led to a number of problems in legal regulation of commercial relations in Ukraine in practice. This article is devoted to the disclosure and analysis of these inconsistencies. In author’s opinion, this study will be useful for: 1) foreign scholars dealing with civil and commercial law; 2) foreign investors (including from EU countries) who are already conducting economic activity in Ukraine or plan to invest in the Ukrainian economy.

**Some conflicts in commercial relations regulation**

Problems of legal regulation are related to inconsistencies in the law of both Codes. It should be noted that the most important and acute problems are in such fields like property, legal entities and obligations under the Civil and Commercial Codes of Ukraine.

*Types of ownership*. Article 63 of the Commercial Code of Ukraine introduces the concept of a mixed form of ownership, namely, collective ownership.

At the same time, the Constitution of Ukraine and the Civil Code of Ukraine define only private, state and communal property and do not distinguish between mixed (or collective) form of ownership. The collective form of ownership lost its significance as a remnant of Soviet law, when collective ownership was the dominant form of ownership.

*Penalties for obligations.* A different approach is used in determining fines. In accordance with the Art. 232 of the Commercial Code of Ukraine if for non-performance or improper performance of obligations imposed penalties, the damages are reimbursed in the part not covered by these sanctions.

While in accordance with Art. 624 of the Civil Code of Ukraine: “If a penalty (fine) is imposed for breach of obligation, it is subject to recovery in full, regardless of damages. The contract may establish an obligation to reimburse damages only insofar as they are not covered by the penalty. The difference is that the Commercial Code applies an imperative approach to the application of fines in obligations, while the Civil Code of Ukraine proposes for the parties to determine the ratio of damages and penalties on the basis of the dispositive method.

*Differences in legal capacity*. According to the Civil Code of Ukraine, legal entities have universal legal capacity, ie a legal entity is capable of having the same civil rights and obligations (civil legal capacity) as an individual. Thus, the Article 91 of the Code stipulates that a legal entity is capable of having the same civil rights and obligations (civil legal capacity) as a natural person, except for those which by their nature can belong only to a person.

At the same time, the provisions of the Commercial Code of Ukraine provide for a special legal capacity, when a legal entity has just such rights and obligations that correspond to the purpose and objectives of its activities (Articles 57, 207 of the Commercial Code of Ukraine).

*Difference of approaches to the system of legal entities*. There are two different in terms of methodology systems of legal persons in Ukrainian law. system provided for by the CC and system under the CoC of Ukraine.8 Under the CC of Ukraine, legal persons are divided into legal persons of public law and legal persons of pri­vate law (Art. 81 of the CC). Legal persons may be set up in the form of companies, institutions and in other forms established by the law (Art. 63 of the CC). Under the CoC of Ukraine, depending on the way of formation (foundation) and formation of the authorized cap­ital legal persons are divided into unitary and corporate enterprises. Unitary enterprises mean state, communal enterprises, enterprises based on the property of association of citizens, of religious organi­zation or on private property of the founder (Art. 63 (Ill-V) o t e CoC). Other laws provide for other forms (types) of legal persons

As a result there are more than 80 legal forms of enterpreneurs, which impede legal definiteness and established development in commercial area, because Ukrainian law does not contain an exhaustive list of types (form) of legal entities (persons).

*Existence of some archaic legal forms of entrepreneurial activity*. In the past it was an obligatory condition for the limited liability companies, additional liability companies and joint-stock companies to have a minimum of three founders. Therefore a private enterprise was popular as a kind of company with one owner and without obligatory minimal capital. Nowadays LLC, ALC, JSC may be established by one person who becomes the sole shareholder (founder). Therefore, the question arises: is there a need to preserve such type of legal entity as a private enterprise, which according to Article 113 of the Commercial Code of Ukraine is an enterprise operating on the basis of private property of one or more citizens, foreigners, persons without citizenship? In fact, an enterprise operating on the basis of private property of a legal entity or a physical person is a limited liability companybut with some restrictions.

*Different approaches to understanding the essence of the enterprise in the theory of law*. There are different approaches to the definition of an enterprise. An enterprise is an object in civil legal relations (Civil Code of Ukraine); the enterprise is a subject, an economic entity (Commercial Code of Ukraine). Commercial Code of Ukraine discloses the concept of enterprise as an independent business entity established by a competent public authority or local government or other entities to meet public and personal needs through the systematic implementation of production, research, trade and other economic activities in the manner prescribed by this Code and other laws (Art. 62). In contrast, Civil Code of Ukraine stipulates that an enterprise is the joint property complex used for business activities (Art. 191).

*Ineffectiveness of partnerships in Ukrainian company Law.* Statistics on the number of registered partnerships in Ukraine clearly show that a full partnership and limited partnership in absolute terms show a downward trend. The decline in the number of registered businesses is to some extent a typical phenomenon in the economy of each country and it is due to various reasons: the financial crisis, changes in economic policy, the fight against the “shadow business”, changes in tax laws and more. For example, after the introduction of the mandatory single social contribution for individual entrepreneurs, the number of entrepreneurs in Ukraine fell sharply. This is due to the significant number of so-called "sleeping individual entrepreneurs", who did not carry out systematic active economic activity, but were used from time to time in order to optimize the taxation of other entities (usually legal entities).

But unpopularity of partnerships is caused also by: ineffective legal regulation of relation between partner and partnership; complicated founding of a limited partnership etc. In the absence of tax preferences[[4]](#footnote-4), investors do not want to bear the higher risks associated with the partnership.

There have been adopted two main approaches in the theory and court practice to the resolution of above mentioned legal conflicts: 1) identify­ing general and special norm in accordance with the scope of norma­tive regulation; or 2) in accordance with the peculiarities of the mechanism of regulation. In the latter case reference is made to the provision of Part 2 of Art. 9 of the CC of Ukraine, according to which the law may provide for peculiarities of regulation of property relations in com­mercial area, and to the provision of Part 2 of Art. 4 of the CoC of Ukraine, according to which peculiarities of regulation of property relations of economic entities are established by the Commercial Code. Therefore, the main point of such approach is to identify subjective composition of their participants. Supporters of this position consider that the gen­eral provisions of the CoC of Ukraine are to be applied to the relations between entrepreneurial entities. If one of the subjects of some private relations is a physical person, then the provisions of the Civil Code of Ukraine are to be applied[[5]](#footnote-5).

**Dualism of Private Law: foreign experience**

In most european countries, two codes coexist: the Civil Code as the basic codified act of private law and the Commercial Code (or the Companies Act). In particular, codes of economic (trade) law were adopted and are functioning successfully in such european countries as France (*Code de Commerce[[6]](#footnote-6)*), Germany (*Handelsgesetzbuch[[7]](#footnote-7)*), Austria (*Unternehmensgesetzbuch[[8]](#footnote-8)*), Poland (Kodeks spółek handlowych*[[9]](#footnote-9)*), Czech Republic (*Zákon o obchodních společnostech a družstvech (zákon o obchodních korporacích*)[[10]](#footnote-10), etc. The structure of these commercial codes differs.

The Commercial Code of France (2000) contains rules on the commercial act, on merchants, their status, responsibilities, on cooperative retailers, mutual guarantee societies, brokers, commission agents, carriers and commercial agents. The second book of the Code "On business companies and asociations of economic cooperation" is devoted not only to national economic entities, but also to european associations of economic cooperation. The third book "On some types of sales" contains rules on certain types of sales and the conditions that apply to the exclusive sales. A separate part is devoted to the procedure for pricing and competition (Book Four "On Freedom of Price and Competition"). The Code contains rules on the drafting and form of a bill of exchange, endorsement, acceptance, aval, payment and claims. There are also provisions on commercial collateral, rules for storage of goods in warehouses, accreditation of these warehouses (Book Five "On commercial securities and collateral").

German law served as a model for the formation of not only business but also private law in a number of Eastern European countries. In this case, the Commercial Code of Germany (Handelsgesetzbuch) contains rules for certain types of companies, as well as rules for business contracts, the register of legal entities, the procedure for registration of business entities in the register, etc. The Commercial Code defines the main economic entities - entrepreneur (*Kaufmann*), their associations (*Handelsgesellschaft*), commercial representative (*Handelsvertreter*), brokers (*Handelsmakler*), regulates the functioning of the Trade Register and the procedure for entry in the Trade Register; defines trade agreements (*Handelskauf*), commission transactions (Kommissionsgeschäft), etc., establishes rules for accounting, balance sheets, determination of financial results of the company and many other aspects of economic activity.

Austrian Commercial Code (*Unternehmensgesetzbuch*) contains the legal norms on the basics of business (Book I "General provisions, definition of business entity” (§ 1" Entrepreneur and enterprise"), types of partnerships (Book II "General partnership, limited partnership and silent partnership"), and the rules regulating business agreements (Book IV "Business Transactions"), accounting for business transactions (Book III "Accounting"), regulation of certain areas of economic turnover (Book V " Maritime trade ")[[11]](#footnote-11).

It is noteworthy that the Austrian Commercial Code contains rules governing maritime transport, while Austria was long landlocked, maritime trade is not one of the leading sectors of austrian economy. The reason is that the code was adopted at a time when Austria was an empire with access to a number of Mediterranean seas. Despite significant economic, political, territorial changes in the country, the code continues to function with to some extent "archaic provisions" (Book V "Maritime Trade"). The stability of regulations is placed above short-term situational changes. In addition, the author would like to emphasize that the Austrian Commercial Code is not exclusively a company code. Only Book II is devoted to the latter. Other provisions regulate various aspects of economic turnover - from economic contracts (Book IV) to accounting (Book III).

Looking at the law of neighboring countries, it should be noted that the economic legislation of Poland has undergone significant reforms. For a considerable period of time, the state had a Commercial Code (1934), which in many respects resembled the Commercial Code of Germany[[12]](#footnote-12). This can be seen both in the borrowing of the structure of the code, the system of concepts (German - *handler*, polish - *kupiec*, etc.), and in the regulation of the system of obligations of economic entities, the presence of the so-called Introductory Law to the Commercial Code». According to A.Shumansky, the previous Commercial Code was much more reminiscent of the Slavic interpretation of the German HGB than the current Code of Polish Companies (2000)[[13]](#footnote-13).

Despite considerable discussions on the abolition of the Polish Commercial Code and proposals to unify economic legislation under the Civil Code, such ideas have not been implemented. With the formation of the Commission on the Codification of Civil Law and the Subcommittee on the Reform of Corporate Law (composed of professors S.Sołtysiński, A.Szajkowski and J.Szwaja)[[14]](#footnote-14), the Code was reformed. As a result the Code of Business Associations (*Kodeks spółek handlowych*) was adopted on the basis of discussions, while discussions on updating the Civil Code of Poland are ongoing. Despite the developers' desire to absorb economic norms under civil law, this idea has not been implemented. Code of Business Associations regulates the system, procedure of founding, reorganization and termination.

In this context, it should be noted that there is also a single approach to the regulation of business relations in the United States. A model codified act of commercial law - the Uniform Commercial Code (Uniform Commercial Act)[[15]](#footnote-15) was taken as a basis by the most states. This document serves as a model for the legal regulation of commercial relations at the state level, regulates a wide range of economic relations (sales; rent; working capital; bank deposits and collection operations; electronic funds transfers; letters of credit; comprehensive sales; warehouse certificates; investment securities, security contracts, etc.).

Uniform Commercial Act is used not only by state legislators to unify US trade law. The achievements of the UCC were taken into account by European legislators when elaborating "model" EU documents in 1997 and 2003. Currently, there is a reverse trend, when the Principles of European Contract Law, which have absorbed the experience of trade law of the European Union, as well as international conventions, are among the most important sources for modifying the UCC.

So the above mentioned comparison proves that the existence of Commercial codes is typical for the developed and developing states.

**Conception of Commercial Law Reform in Ukraine**

In opposite the Concept of Civil Legislation Reform in Ukraine[[16]](#footnote-16) states that the systematic renewal of the Civil Code of Ukraine as a whole is possible only if the Commercial Code of Ukraine is repealed. The latter does not meet the parameters of the acts governing business relations, which by their nature are primarily private law. Thus, the reform of civil legislation is seen only if the Commercial Code of Ukraine is repealed, as the latter is outdated, contains many "archaic" legal institutions, does not meet the market conditions of legal regulation of business relations. At the same time, no vision is proposed for a future act (a number of acts) that should regulate the relevant legal relationship.

Unfortunately, there is an opinion among the representatives of civil law that the economic code is a relic of the past, and the very idea of ​​a single codified act in the field of economics does not correspond to modern trends in the regulation of business relations.

The concept proposes to enshrine in the Civil Code an exhaustive list of organizational and legal forms of legal entities. The Civil Code of Ukraine as a fundamental act of private law, which regulates including general provisions on legal entities, should define an exhaustive list of their organizational and legal forms while abandoning the archaic structures of legal entities (especially enterprises). For legal entities that are registered in the other organizational and legal forms, it is proposed to provide time to bring their organizational and legal form in line with the provisions of the Civil Code within the period to be established by law.

On the one hand, implementation of the proposed Concept, which is based on the idea of ​​"soft recodification", should preserve all the achievements of the current Civil Code of Ukraine, and on the other – should adapt it to modern realities, including modern civil and business turnover, which is characterized by digitalization of all processes in society, deep penetration of new technologies into business, priority application of ECHR judgments and other international human rights instruments, support of international initiatives for information society development, conscious use of automated robots and artificial intelligence, reproductive technologies and genetic engineering, increasing the role of dispositiveness in contractual regulation, etc.

**Conclusions**

1. With regard to the proposals expressed in the Concept, the author would like to note that undoubtedly the Commercial Code of Ukraine as well as the Civil Code of Ukraine need some updating. There is an urgent need to systematize the existing organizational and legal forms of legal entities, to renew the basics of civil law regulation in Ukraine.

2. However, there are no grounds for repealing the Commercial Code of Ukraine. Commercial (trade) codes continue to be the legislative basis on which the whole array of centuries-old law institutions functions.

3. While in most neighboring jurisdictions steps are being taken to systematical updating of commercial codes (including expanding the scope of its legal regulation), in Ukraine steps are being taken to eliminate the commercial code. This seems completely unacceptable, harms significantly the legal regulation of business relations in Ukraine, slows down the progressive development of Ukraine's economy.

4. The analysis of commercial codes abroad shows that there is no single approach to the list of legal constructions that should form the basis of the relevant code. All, without exception, codified acts of this type are characterized by the presence of special institutions that from the point of view of a foreign lawyer, or current trends in private law, will seem do not meet certain standards. But such a situation does not gives grounds for the elimination of the relevant commercial code. Therefore Ukrainian legislator should take the way of modernizing and not of repealing the Commercial Code.

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