

## DEFINITION OF ENTREPRENEURSHIP

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**Annotation:** The article researches the problem of defining entrepreneurship in Ukrainian legislation, focusing on systematic nature as an important component of entrepreneurship, clearing out the uncertainties connected to it, researching the history of this concept in Ukraine, taking into account judicial practices and actual court resolutions, comparing Ukrainian definition of entrepreneurship to the Russian, Belarus and German ones, looking for weaknesses and ways to improve it.

**Key words:** entrepreneurship, business activity, legislation, definition, systematic nature, court

The problem of the importance of concept's definitions in legislation is known to be especially researched by numerous lawyers. The reason for such attention is the fact that normative definitions are crucial and play a significant role in the legislative process. The legislator places high hopes on them as well as on their implementation. It is difficult to imagine a modern legislative act without definitions of the basic concepts used in it.

According to reasons mentioned above, it is extremely important to investigate definitions and in this paper the basic definition, which lies under all legislation dealing with economic and business activity, of entrepreneurship is researched.

In Ukrainian legislation 'entrepreneurship' is defined in article 42 of Economic Code as "to be understood as a separate, initiative, systematic, own-risk economic

activity, carried out by business entities (entrepreneurs) with the purpose of achieving economic and social results, and generating profit.” [1].

Previously, the definition was stated in the Law of Ukraine “On entrepreneurship”, where it was defined as “Entrepreneurship is a direct independent, systematic, at your own risk activities for the production, performance of works, provision of services for profit, which is carried out by individuals and legal entities registered as business entities in the manner prescribed by law” [2]. However, the Law expired in 2004. There is no time when two definitions were legal at the same time, since the Economic Code entered into force in 2004. So there are some differences in the definitions. In the old definition the highlight was on registration, but now it is said just in ‘business entity’ that is by definition legally registered. What is important is that a new feature of entrepreneurship is added such as initiative. That is an important innovation into Ukraine’s legislation, since when the activity is not initiated by the person doing it, it cannot be regarded as entrepreneurial one. Also in the older definition it was specified which activity can be regarded as entrepreneurial (“activities for the production, performance of works, provision of services for profit”), however, this was rightfully deleted from the Code. So the definition of entrepreneurship has its background, it evolves with time, adapting to new realms.

The systematic nature of entrepreneurship is what differentiates it from other types of economic activity, which can bring income (income), but not systematically, not continuously without special directing. Systematic nature of activity is what ensures systematic income to the entrepreneur. The element of systematic nature has a crucial meaning for entrepreneurial activity as a social phenomenon and as a special type of economic activity. So it is important to include this characteristic into the definition of entrepreneurial activity.

However, there are some uncertainties in the current definition. It is unclear how many times the activity shall be carried out to be understood as systematic, what may become a hole for corruption and disputes. So let us research this point in more details.

There is an opinion in literature that if goods are sold more than four times a year, such activities are considered systematic. This position is based on the Decree of the Cabinet of Ministers of Ukraine of March 17, 1997 "On Craft Tax"[3]. According to the law, "In the case when the sale of goods is carried out during the calendar year more than four times, such activities are considered systematic and obliges citizens to register as entities entrepreneurship in accordance with current legislation of Ukraine." So if an activity is carried out 1, 2, 3 or 4 time during a calendar year, it is not considered systematic nor entrepreneurial, so the person carrying it out shall not be deemed as entrepreneur and shall not be redistricted nor pay taxes, except individual income tax.

This position was supported by court practice. The decree was applied by city district courts in 2011 and 2012. For example, in the decision of the Khmelnytsky City District Court of the Khmelnytsky region of 07.09.2011 there is a reference to this Decree and the requirement for "more than 4 times". As there is no evidence in the case file that the person sold vegetables and fruit systematically, more than 4 times, the Court ruled that his actions did not constitute an administrative offense. This decree has been referred to in more than 400 decisions in district courts, around 200 of which are cases of administrative offenses [4]. However, the law expired on 01.01.2011, but for some unexplained reasons it has been still referred to till nowadays in 28 district court decisions [4].

So after the Decree went out of rule, the question again remains unanswered: how to define systematic nature of an action. Now it is legitimate to refer to the resolution of the Plenum of the Supreme Court of Ukraine of 25.04.2003 № 3 "On the practice of application by courts of legislation on liability for certain crimes in the sphere of economic activity". It is written in the Plenum that "... signs of business, i.e. is carried out specified person directly independently, systematically (not less than three times during one calendar year) and at your own risk." [5]. This Plenum has been referred to in more than 2 500 decisions in cases of administrative offenses by district courts [4].

So, the activity is regarded as of systematic nature in case of its implementation 3 and more times during a calendar year. However, the Plenum entered into force on 25.04.2003, meaning that for some time, from 25.04.2003 till 01.01.2011, there were two clarifications on systematic nature. Looking into the archive of the cases solved on this topic during given time frame, we see that 71 resolutions used the Law of Ukraine “On craft tax”, stating systematic nature from more than 4 time during a calendar year, and only 5 resolutions using the Plenum, stating that systematic nature starts from no less than 3 times during a calendar year [4].

It is worth mentioning that repetitive nature of an activity also may not be considered the same as systematic nature. It can be observed in the resolution of the case № 686/25700/16-п by the court of Khmelnytsky region from 15.05.2017 [4]. A person was blamed for carrying out economic activities, namely: the manufacture of furniture and mirrors without state registration, which violated Article 58 of the Economic Code of Ukraine. However, evidence that the person repeatedly provided services for the manufacture and sale of glassware, mirrors and other furniture elements were not included to the case file. It is stated in the resolution that “acts of inspections from 29.06.2016 and from 09.11.2016, as well as explanations of PERSON\_2, PERSON\_3 and PERSON\_4, indicate only the repetition of manufacturing and selling of glass products by PERSON\_1, but does not indicate the systematic nature of this activity.” As a result, the case was closed due to the absence of an administrative offense in their actions. Moreover, in the case № 322/454/17 the court stated that “some, episodic facts of the sale of tobacco products from the hands do not fall under the definition of entrepreneurial activity.”

One more interesting incident in court practice took place in Popasnyansky district court of Luhansk region. In case № 423/539/17 a person was accused of doing entrepreneurial activity without state registration on a market selling confectionery in assortment, having bought it from a private entrepreneur with an invoice with the aim of future selling. In written explanations she stated that for the last two years she has been retailing confectionery on the market, weekly, on Tuesdays, Thursdays, Saturdays and Sundays, in order to make a profit, receiving a monthly income of

UAH 2 000. However, the court did not find her guilty. The court stated: although the written explanations of PERSON\_1 contain allegations of retail trade in confectionery on their own initiative, systematically, for profit, but this is not confirmed by the objective circumstances of the case and any other evidence [4].

It is also worth mentioning that in resolutions by Rubizhne City Court of Luhansk Region and Khmelnytsky City District Court of Khmelnytsky Region from 21.02.2019 and 31.08.2011 it was indicated that “In accordance with the requirements of Art. 39 of the Law of Ukraine "On Road Transport" in the case when the operation of a car is carried out during the calendar year more than four times, such activities are considered systematic and oblige citizens to register as business entities in accordance with current legislation of Ukraine.” However, looking into the Law from different editions of different years we do not find any mentioning of systematic nature starting from more than 4 times during a calendar year [6]. So it is highly unclear what documents these decisions relied on.

It is necessary to look how other countries give the definition of entrepreneurial activity, to look at the problems of their definition and to compare it to the current Ukrainian one in order to improve our legislative base. First of all, it is vital to research the definition of neighbour countries such as CIS countries since their legislation is also based on the USSR one and they had similar starting point as Ukraine, furthermore, a lot of the conditions of doing business are similar. The corruption rates are also on the same level [7]. In 2019 Ukraine was ranked 126 with the score of 30 out of 100, what is an improvement since 2012. Russia is 137 with 28 and Belarus is 66 with 45 points.

Due to reasons named above, it is sensible to compare the definition of entrepreneurship to Russian one first. In Civil Code of the Russian Federation, article 2, it is stated that “entrepreneurial activity is an independent activity carried out at its own risk, aimed at the systematic receiving of profit from the use of property, the sale of goods, the performance of work or the provision of services.”[8] Belarusian Civil Code gives the definition of entrepreneurship in article 1: “Entrepreneurial activity is an independent activity of legal entities and individuals, carried out by them in civil

circulation on their own behalf, at their own risk and under their property responsibility, and aimed at the systematic receipt of profit from the use of property, sale of things produced, processed or acquired by these persons for sale, as well as from the performance of work or the provision of services, if these works or services are intended for sale to other persons and are not used for their own consumption.”[9]. There we see very similar definitions to the Ukrainian one; systematic is also a feature of entrepreneurship. However, while in Ukraine the activity is systematic, in the Russian Federation and the Belarus Republic the receiving of profit shall be systematic, not the activity of an entrepreneur.

Having consolidated this feature, the Civil Code of the Republic of Belarus, the Civil Code of the Russian Federation did not define either the concept of profit or the concept of the systematic nature of its receipt, which caused just criticism of scientists and attempts to interpret these terms. So they have similar problem of defining entrepreneurship.

The systematic nature of the entrepreneur's actions ensures the systematic nature of obtaining income (profit), and the direction, conscious and purposeful, determines the appropriate organizational structure of the entrepreneur's professional activity: the choice of a market segment, positioning on it, marketing, etc. Judicial practice is based on the fact that a person, carrying out entrepreneurial activity, should set the goal of not making a one-time profit, but getting it as a trade, on a regular basis, and the activity itself should be systematic. The explanations of the Plenum of the Supreme Court of the Russian Federation on this issue boil down to the fact that individual cases of the sale of goods, performance of work, provision of services do not indicate that the activity was aimed at systematic profit. And vice-versa, evidence confirming that a person is engaged in activities aimed at systematic profit can be testimony of persons who paid for goods, works or services, receipts for receiving funds, placing advertisements, exhibiting samples of goods at points of sale, concluding lease agreements, etc.[10]. As noted by A. N. Zevaykina in their science paper ‘Discussion issues of the concept of entrepreneurial activity’, "the most correct is the approach of those scientists who use not a quantitative criterion, but a

qualitative one - the direction of actions towards a specific goal"[11]. Also it is worth mentioning that it is possible to have a one-time profit from systematic behavioural acts; and vice versa, systematic profit from a single action. It is possible from systematic behavioral acts (for example, from the execution of one contract – eg. a construction contract) to make a profit repeatedly (partial advance payment and (or) payment for individual stages of work) or once (payment for the result of the work performed as a whole). And according to Russian and Belarus definition, the first situation is regarded as entrepreneurship but the second one not, but according to Ukrainian legislation such ridiculous mismatch is impossible since the actions taken in both situations are the same and they both are systematic or not.

Also, there is an opinion among Russian lawyers, S. E. Zhilinskiy in particular [12], that it is appropriate to recognize one-time actions aimed at making a profit as entrepreneurial activity. He gives as an example a case of long-term construction of an object despite the fact that a multimillion-dollar payment for these works was received only once, asks: “It means that there is no systematic profit and no entrepreneurship? And if the builders were paid monthly, is there entrepreneurship?” And this approach may help legalize a bigger part of the economy and reduce shadow interactions.

However, if a person during a certain period carried out actions aimed at making a profit, but due to a risk factor he could not achieve this, then this activity cannot be considered entrepreneurial? Again such question is not under consideration when the systematic nature is a feature of activity but not receiving profit.

According to S.G. Vorontsov, it is the focus on making a profit, that is, the possibility of making it, and not its actual systematic receipt, that is a sign of entrepreneurial activity [13]. This idea is, actually, relevant to Ukrainian issues with definition. Because in some cases it is possible that the person intended their activity to be systematic and on their own risk, but due to some external factors the person was unable to lead their activity systematically, the question arises whether or not they shall be charged as unregistered entrepreneurs or not. Looking into judicial practice, we can refer to the case № 607/25621/18 from 28.12.2018. In the case there

was a person who had intended to carry out the activity of taxi service and even had installed a taxi lighting, but he claimed that he did not carry out business activity of passengers carriage. He was accused of carrying out business activity without state registration, but it was stated that “As a result of research of materials of administrative case, it is established that the protocol on administrative offense № 0018143 from 01.12.2018 and the materials attached to it do not contain data that PERSON\_1 carried out independent, initiative, systematic activities for the provision of passenger services, and therefore, the court concludes that the latter is not proven that the latter is a business entity and may be held administratively liable under Part 1 of Article 164 of the Code of Administrative Offenses, which regulates public relations in the field of economic activity.”[4]. So in general, the court does not regard intention of providing systematic services as a sign of entrepreneurial activity, only the factual systematic implementation of them, but all such cases are sent to further investigation.

German has a different approach to defining entrepreneurship. According to its Civil Code, “an entrepreneur means a natural or legal person or a partnership with legal personality who or which, when entering into a legal transaction, acts in exercise of his or its trade, business or profession” [14]. This definition is quite different from the ones common in the CIS territory. The main difference from the Ukrainian one is that there is only one sign of entrepreneurship that is entering into transactions, exercising trade, business or profession. It may be similar to the mentioned above opinion of some Russian lawyers to regard all, even one-time, actions aimed at receiving profit as entrepreneurial. However, one more important point that distinguishes German definition is that entrepreneurship regarded not only as aimed at profit. From this point of view, it may be more similar to the Ukrainian definition of economic activity, stated in the article 3 of the Economic Code [1].

To sum up, definitions play an important role in legislative system and entrepreneurship is a ground for all economic regulations. Although the definition of entrepreneurship has developed and improved through time in Ukraine, it still has some gaps of uncertainties, such as its sign of systematic nature of business activity.



This question evolved through time and now most courts refer to the Plenum of the Supreme Court of Ukraine of 25.04.2003 № 3 “On the practice of application by courts of legislation on liability for certain crimes in the sphere of economic activity”, which states that systematic is no less than 3 times during a calendar year. However, each case is unique and requires unique approach, so sometimes repetitive nature is not the same as systematic one and intention of carrying out the activity systematically is not usually enough. It is essential to have enough proves of systematic activity that the court usually lacks. Comparing the definitions of other countries, we find out that Russia and Belarus have similar definitions, but they require not systematic activity but systematic receipt of profit, what lots of lawyers argue against. German definition is far more an umbrella one, including all transactions without paying attention whether they are initiative or systematic, carried out with the aim of getting profit or not.

So Ukrainian definition of entrepreneurship has improved and has some advantages, but it still has a way to grow more precise in order to reduce gaps in the legislation and decrease corruption.

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