

iz stranog prava

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THE NOTION OF AN ENTERPRISE IN SLOVAK LAW

Broadely speaking, the notion of an enterprise refers to an economic and legal entity constituting one of the essential forms of organizing the economy in economic systems based on the production of goods. Its basic distinguishing features are:

- a) economic independence,
- b) legal personality.

An enterprise operates as an independent entity on the market and the resources essential for the development of its activity are largely generated by the sale of its products or services. Hence, company's operation is based on the principle of economic exchange and on the profit-making principle. In economic terms, an enterprise is a technological, social, economic and ecological unit with independent decision-making competence and with its own risk. Among its essential features are:

- a) mix of production factors
- b) efficiency of business activity
- c) financial balance.¹

A precondition of the economic independence of an enterprise is its legal independence, i.e. the fact that it is a legal entity; it may also have a different legal form and vis-à-vis other entities it acts as an independent entity with specific rights and obligations.

Among typical legal forms of an enterprise are:

- general commercial partnership (German *offene Handelsgesellschaft*, French *société en nom collectif*),
- limited partnership (German *Kommanditgesellschaft*, French *société en commandite*),
- limited liability company (German *Gesellschaft mit beschränkter Haftung*, French *société à responsabilité limitée*),
- joint stock company (German *Aktiengesellschaft*, French *société anonyme*).

The statutory definition of an enterprise is laid down in Article 5 of the Commercial Code. Within the meaning of applicable law an enterprise constitutes an entirety of tangible assets, intangible assets and personnel qualifications. An enterprise is made up of things, rights, and property values which belong to the entrepreneur and which serve

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¹ Pinková, D. – Neumannová, A., *Podniková ekonómika*, VO PF UK, Bratislava, 1996, s. 53.

the purpose of the enterprise operation, or, given their very nature, are intended to serve the above purpose. In accordance with the explanatory report, an enterprise is to be understood as a certain entirety of business activity carried out by a single business entity. It is not only made up of tangible assets but also of human resources and business-related rights. As a whole, an enterprise is of certain worth which is created by combining the above elements of an enterprise.

An enterprise may be an object of sale and purchase, of lease, etc. The worth of an enterprise is determined by the written-down value of tangible assets and by the evaluation of personnel qualifications (i.e. of the structure and qualifications of human resources) and intangible assets (business name, intellectual property rights, etc.).

The above specific definition of an enterprise covers several elements of an enterprise:

- a) tangible assets, i.e. buildings, machinery, equipment, means of transportation, etc., which account for the tangible dimension of an enterprise;
- b) human resources, i.e. managers and other personnel of an enterprise whose managerial skills and qualifications are crucial for an efficient running of an enterprise;
- c) intangible assets, i.e. business name, trademark, trade secret, know-how, goodwill, etc.

The notion of an enterprise, as laid down by the Commercial Code, is not generally accepted, as it does not capture the complexity and thoroughness of the concept. In older literature attempts were made to define the notion of an enterprise in both objective and subjective meanings.

Objectively speaking, an enterprise is neither a thing nor right; it is an outcome of the materialization of a business idea. Above all, this idea is an intellectual product, it is the outcome of a thought process of the founder of an enterprise about the organization and arrangement of capital assets. The above organization idea links to knowing sales opportunities, i.e. knowing that in a certain district a certain need of the population is not fully met, either qualitatively or quantitatively. Jointly, the organization idea and knowing sales opportunities create the idea of an enterprise, or, an enterprise in the meaning of an intangible asset.

Subjective right, the object of which is an enterprise in the above meaning, is the title to intangible assets, to related copyright; however, a feature that distinguishes it from those rights is that it is not an exclusive right.²

The above ideas suggest that in order to define the notion of an enterprise which is considered to be an actual phenomenon,³ the creative idea of the enterprise founder must be looked upon as an intangible asset – it is the founder identifying a niche on the market which is filled in by his enterprise and for which he found customers. An enterprise is nurtured on customers which must be around from inception to the winding-up of an enterprise.

It is the customer-enterprise relationship which, after an exacting analysis, brought I. Pelikánová to a conclusion on the substance of an enterprise in the meaning that it is connected with certain entities under the law whose legal form and quantity have no

² Wenig, A.: *Příručka obchodního práva platného v Čechách, na Moravě a ve Slezsku*, vydání Typos, Brno, 1928, s. 64.

³ Krejci, H.: *Grundriss des Handelsrechts*, Manz, Wien, 1995, s. 77.

decisive role and are varied.⁴ Hence, a distinction is made between an enterprise and an operator who is the owner managing and controlling the enterprise.

Sometimes in legal communications, several tangible assets may constitute a single object of civil law relations because they are treated in entirety and, depending on circumstances, it is approached as an economically indivisible or divisible whole. In civil law theory, and sometimes even in civil law legislations, such sets of tangibles are referred to as *universitas rerum*. The applicable Commercial Code does not stipulate this concept and it has no special provision for such cases either. On the other hand, it does not exclude the notion of *universitas rerum*.⁵

Within the domain of commercial law, the above conclusion suggests that an enterprise as *universitas rerum* may be an object of property arrangements:

- 1) Sale of an enterprise or its part is possible on the basis of a contract of sale of an enterprise (Art. 476 to 488 of the Commercial Code). According to Art. 261, para 3d) of the Commercial Code this contract is an absolute deal and it shall exclusively be governed by the Commercial Code. In the contract on the sale of an enterprise the seller undertakes to transfer to the buyer his title to assets, other rights and property serving the operation of an enterprise and the buyer undertakes to assume the seller's commitments related to the enterprise and to pay purchase price;
- 2) Lease of an enterprise is also a possible option and in such a case Art. 663 et seq. of the Civil Code on lease contract shall apply. The lease and sublease of business premises procedure is laid down in Act No. 116/1990 Coll. on the lease and sublease of business premises, as amended;
- 3) An enterprise may also be an object of the contract on the purchase of a leased asset in accordance with Art. 489 et seq. of the Commercial Code;
- 4) As appropriate, the entrepreneur may also use an enterprise as an object of lien. In this case, the provisions of Art. 151a et seq. of the Civil Code on lien shall apply, whereby the provisions under 151e shall be complied with, i.e. lien is established by its registration with the Notary Central Registry of Liens; or, if it is a real estate, by its entry in the real estate cadastre;
- 5) Donation of an enterprise may be carried out on the basis of a contract of donation according to para. 628 et seq. of the Civil Code. However, certain problems may arise in conjunction with its execution in the meaning of para 630, on the basis of which the donor may request the return of the donation in the event the beneficiary behaves to the donor or the members of his family in a manner which is in gross breach of good manners;
- 6) The barter of an enterprise may be carried out on the basis of a barter contract pursuant to Art. 261, para. 6 et seq. of the Commercial Code and the provisions of the Commercial Code shall be appropriately applied to it;
- 7) The inheritance of an enterprise is an option if the entrepreneur is a natural person. In the event of the insolvency of inherited assets the court may issue a ruling on the liquidation of inherited assets in accordance with Art. 175t, para 1 of the Code of Civil Procedure;

⁴ Pelikánová, I.: *Úvod do srovnávacího práva obchodního*, C. H. BECK, Praha, 2000, s. 103-104.

⁵ Kolektív: *Občanské právo hmotné*, Svazek I., 2. aktualizované a doplnené vydanie, Codex, Praha 1997, s. 148.

- 8) An enterprise may also be disposed of by applying bankruptcy or collection enforcement procedure;
- 9) An enterprise may also be disposed of in the form of capital contribution to another entity;
- 10) An enterprise may undergo organizational changes, such as merger, de-merger or acquisition.

The notion of an enterprise is closely connected with the notion of business property which is set out under Art 6 of the Commercial Code. Business property is to be understood as an entirety of property values (things, claims and other rights the value of which may be expressed in monetary terms), which belong to the entrepreneur or are intended for his business. The meaning of this notion is brought out at sale of an enterprise or at its winding-up.

As distinct from the notion of business property, business assets are to be understood as an entirety of business property and liabilities which have accrued to an entrepreneur from his business. Net assets refer to business property net of liabilities accrued to an entrepreneur from his business.

The amendment of the Commercial Code has introduced the notion of shareholders' equity, which is composed of own funds for the financing of the entrepreneur's business property according to a special provision.

The meaning of the definitions of business property, business assets and net assets will come into prominence in connection with the entrepreneur's accounting and governing legal regulations, as well as with tax rules.

Organizational Parts of an Enterprise

An enterprise may be divided into organizational parts. These are intracompany units having no legal personality. Their number and legal status are set out by the internal guidelines of an enterprise, such as rules of organization.

The branch enjoys a special status among the organizational parts of an enterprise. A branch plant is entered in the Companies Register and the entrepreneur's business name is used to operate it, whereby it is expressly said that it is a branch plant.

Other organizational parts of an enterprise may enjoy the status similar to that of a branch plant if it is stipulated by law that it shall be entered in the Companies Register. These are, for instance, branches, sub-branches of financial institutions, manufacturing establishments of manufacturing enterprises.

As distinct from a branch plant which enjoys a special legal status, an establishment constitutes of premises in which certain business activity is carried out. An establishment shall be referred to by the entrepreneur's business name, to which the name of the establishment or other distinguishing indication may be added. An establishment may be entered in the Companies Register as a branch plant, or one branch plant may comprise several establishments which will depend on concrete circumstances and the entrepreneur's needs.

The relationship between an enterprise and an establishment is highly varied. In conjunction with the Small Businesses Act it should be noted that a distinction is made between the place of business and the practising of a trade in an establishment. Every entrepreneur will have place of business, however, not every entrepreneur is bound to operate an establishment – for instance, he may provide on-site support services to his client.

The place of business is the address at which the entrepreneur runs his business activity, i.e. an administrative building or the entrepreneur's flat.

A discussion whether the enterprise is just an object or also a subject of legal relations is intriguing. I believe that in routine operation (e.g. in conclusion of contracts with suppliers and buyers), an enterprise is the subject of legal relations. In the event an enterprise is disposed of (e.g. by sale), it becomes the object of legal relations and the owner (e.g. partners in a limited liability company who have decided on the sale of an enterprise) shall be separated from the enterprise per se (e.g. a limited liability company).

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Pojam „preduzeća“ u pravu Slovačke Republike

R e z i m e

Ekonomisti i pravnici vode stručne rasprave o tome, šta je u stvari preduzeće. Ove diskusije ukazuju da među njima postoji različito shvatanje ovog pojma, naročito onda ako se u diskusiji precenuje ekonomska ili pravna strana. Problem je kako optimalno odrediti ovaj pojam (i pojmove s njim povezane) u zakonu. A to će biti moguće samo onda, ako ekonomisti precizno formulišu njegovu sadržinu a pravnici ovom pojmu odrede preciznu formu i kada će se ovako kreiran pojam nedvosmisleno upotrebljavati u Trgovinskom zakoniku i propisima koji se na njega nadovezuju (računovodstveni, poreski propisi).

Sa pravnog aspekta interesantna je diskusija o tome, da li je preduzeće samo objekt ili je i subjekt pravnih odnosa. Mislim da u redovnoj privrednoj delatnosti (npr. zaključivanje ugovora robnog prometa), preduzeće je subjekt pravnih odnosa. Ukoliko se raspolaze sa samim preduzećem (npr. prodaja preduzeća), onda je ono objekt ovih pravnih odnosa, a u prvi plan dolazi vlasnički kriterijum.