

### III. CIVIL AND BUSINESS LAW

**Information for citation:**

Vorontsov S. G. *Legal'nye priznaki predprinimatel'skoy deyatel'nosti: problemy terminologicheskoy opredelenosti* [Legal Indicia of Entrepreneurship: Terminological Problems]. *Vestnik Permskogo Universiteta. Juridicheskie Nauki* – Perm University Herald. Juridical Sciences. 2016. Issue 34. Pp. 402–412. (In Russ.). DOI: 10.17072/1995-4190-2016-34-402-412.

UDC 346.26

DOI: 10.17072/1995-4190-2016-34-402-412

#### **LEGAL INDICIA OF ENTREPRENEURSHIP: TERMINOLOGICAL PROBLEMS**

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**Introduction:** article 2 of the Russian Civil Code contains a legal definition of the term “entrepreneurship”. Six indicia of entrepreneurship differ it from other types of economic activity, however, their content is very difficult to define. In theory of law this situation breeds a lot of debates. The application of this rule in practice often leads to violation of rights of citizens and legal persons. Why does this happen? The answer to this question is given in this article. **Purpose:** to identify the real meaning of the term “entrepreneurship” based on the literal interpretation of the indicia contained in the legal definition of this concept. **Methods:** a formal-logical method and a comparative legal method are used. **Results:** as a result of the study, we see a lot of logical fallacies made by the Russian legislator in formulating the legal definition. Based on the Russian legislation, the author of this article has formulated a new doctrinal concept of the term “entrepreneurship”. Moreover, the relation of commerce and business activities has been investigated to differentiate between these concepts. **Conclusions:** the current legal definition of entrepreneurial activities in Russia is groundlessly complicated and comprises secondary indicia that are of no significance. There are only two essential indicia in this definition (a special purpose and the way to achieve it). All other indicia are formal and unable to distinguish entrepreneurship from adjacent kinds of economic activities.

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 Keywords: entrepreneurship; commercial activity; legal indicia of entrepreneurial activity; concept of entrepreneurship

#### **Information in Russian**

#### **ЛЕГАЛЬНЫЕ ПРИЗНАКИ ПРЕДПРИНИМАТЕЛЬСКОЙ ДЕЯТЕЛЬНОСТИ: ПРОБЛЕМЫ ТЕРМИНОЛОГИЧЕСКОЙ ОПРЕДЕЛЕННОСТИ**

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**Введение:** легальное определение предпринимательской деятельности, включенное во 2-ю статью ГК РФ, содержит, как известно, несколько признаков, по которым адресаты правовой информации должны свободно отличать предпринимательство от иных вариантов экономического поведения. Вместе с тем непрекращающаяся научная дискуссия и разноречивая правоприменительная практика говорят о том, что российскому законодателю так и не удалось обеспечить потребителей качественным правовым материалом. Терминологическая неопределенность сказывается на эффективности правового воздействия, а также оказывает весьма ощутимое негативное влияние на механизмы стимулирования надлежащего поведения предпринимателей в гражданском обороте. Попробуем разобраться в причинах этого положения, детально проанализировав легальные признаки предпринимательской деятельности. **Цель:** выявить реальное содержание термина «предпринимательская деятельность» исходя из буквального толкования признаков, содержащихся в легальном определении этого понятия, что позволит повысить эффективность применения стимулирующих механизмов надлежащего исполнения обязательств теми, для кого они, в общем-то, и разрабатываются. **Метод:** формально-логический и сравнительно-правовой. **Результаты:** выявлены логические недочеты, допущенные российским законодателем при формулировании легального определения предпринимательской деятельности; уточнен ближайший род и видовые отличия изучаемого понятия; дано доктринальное определение предпринимательства; произведено разграничение понятий коммерческой и предпринимательской деятельности исходя из буквального толкования положений действующего российского законодательства. **Вывод:** действующее легальное определение предпринимательской деятельности неосновательно усложнено второстепенными, не имеющими значения для обозначения сути предпринимательства, признаками. Данная терминологическая неопределенность в значительной степени снижает эффективность стимулирующих мер, направленных российским законодателем на обеспечение надлежащего поведения и исполнения гражданско-правовых обязательств. Реальных существенных признаков в определении всего два (специальная цель и способ ее достижения). Все остальные являются формальными характеристиками и не в состоянии помочь адресатам правовой информации отличить предпринимательскую деятельность от смежных видов экономического поведения.

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Ключевые слова: коммерческая деятельность; легальные признаки предпринимательской деятельности; понятие предпринимательской деятельности

The legal definition of entrepreneurial activity (hereinafter referred to as EA), provided for in Article 2 of the Civil Code of the Russian Federation, contains, as is known, a number of signs, with the help of which addressees of legal information are supposed to easily distinguish entrepreneurship from other variants of economic behavior. However, the ongoing scientific debate and contradictory law enforcement practice shows that the Russian legislator failed to provide consumers with proper legal content. All this definitely affects the effectiveness of legal sanctions in general and has a very tangible negative impact on the incentive mechanisms for proper conduct of entrepreneurs in the civil turnover.

For law enforcement authorities, the understanding of the meaning of the definition under consideration should serve as a guarantor of law observance, which will not allow one to replace the law with arbitrariness. For economically active population, it is necessary to understand this issue, at least because entrepreneurship without the state registration can cause criminal liability (in accordance with Article 171 of the Criminal Code) with rather strict sanctions, up to 5-year imprisonment.

There are six legal signs of EA: independence, risk, systematic character, making a profit

as its specific purpose, the method of making a profit (from the use of property, sale of goods, ...works) and the necessity of the state registration.

Some authors in scientific and educational literature replace six signs of EA with five ones, as a rule combining the “system” and “profit”, others count only four signs, when along with the mentioned combination they neglect the method of achieving the entrepreneurial goal... It is quite easy to illustrate how much views of jurists on this issue differ. It is much harder to find similar opinions.

#### **A Brief Overview of Some Opinions on the Number and Essence of EA Signs in Russian Legal Literature**

Professor I. V. Ershova identifies five signs of EA: independence; risk; systematic profit; method of earning a profit; state registration. The first four signs are qualified as essential, the latter is acknowledged as a formal one.

Professor V. S. Belykh considers five signs as well but the composition of these five is different: independence, systematic approach, systematic profit; business risk, legitimization of entrepreneurship. The way of making a profit is interpreted by the author within the sign of the systematic approach and is not identified separately. Legitimization refers to formal, external signs of entrepreneurship [6, pp. 10–14].

Similarly, Professors V. V. Gushchin and Yu. A. Dmitriev consider five standard signs, but their composition is also different from the previous versions: independence; risky nature; commercial nature (directed at systematic profitmaking); way of making a profit; necessity of registration. The latter sign is proposed to be regarded not as a sign, but as a condition of the legality of its existence [1, pp. 12–22].

I. V. Tymoshenko, A. V. Melkumians think EA has six normative signs: independence; making a profit as a purpose of the activity; entrepreneurial risk; systematic nature of gaining profit; state registration of EA participants; responsibility of the economic entity [9, pp. 8–11].

N. V. Rubtsova and M. V. Golyshev, pointing out six signs of EA, go beyond the legal definition: constant basis; professional attitude; risky nature; focus on profit; implementation of EA sui juris and under the entrepreneur’s property liability; independence and initiative [8, pp. 95–96].

Most researchers agree that the necessity of the state registration is a formal sign. Professor S. E. Zhilinsky also considers the sign of the implementation of EA on a regular (professional) basis to be formal [2, p. 80].

Thus, despite the obvious need for simple and comprehensible legal material, neither the legislator, nor science of business law have yet developed a common understanding of what EA actually is and what signs can distinguish it from other types of economic behavior. Let us try to analyze this problem.

#### **Assessment of the Legal Content of Legal Signs of Entrepreneurial Activity**

The formal criterion – the requirement of the EA state registration – is left beyond this paper and we shall deal with the rest ones, which are considered to be essential by most Russian authors in juridical literature.

**Risk.** This characteristic can be called the most “ancient” of all signs used in the definition. Modern Russian textbooks say that risk is immanently inherent in EA, it has always characterized EA; and that is what A. Smith, R. Catillon and even Aristotle wrote about it...

Indeed, this legal characteristic of entrepreneurship, maybe just because of the “age”, is rarely argued against and hardly ever criticized. One may only say that this criterion does not have any certain legal content in the Russian legislation, and give a doctrinal argument for this situation or find a legal concept of risk in a special law regulating, for example, social relations in the field of insurance. However, that is not enough.

Risk, if we understand it as a possibility of an adverse effect occurrence, anyway, accompanies any human activity. Does a firefighter, a police officer, a surgeon, a journalist or a bus driver not take a risk? To a greater or lesser extent, every-

body is at risk. And in this regard an entrepreneur is similar to others.

It can be argued that risk, as an unplanned negative result, is a programmed attribute of any real purposeful activities. And although according to Ostap Bender (a fictional con man who appeared in the novels *The Twelve Chairs* and *The Little Golden Calf* written by Soviet authors Ilya Ilf and Yevgeni Petrov – *comment by the translator*), an ironclad guarantee can be given by a certificate of insurance, numerous bankruptcies of insurance companies show that it is not always so. There are no absolute guarantees. It means that we are always at risk.

On the other hand, we must recognize that there are types of EA in which it is almost impossible to detect a higher degree of risk. Try to justify the increased social costs associated with the risk that an entrepreneur running a shoes repair business might have.

Therefore, in part, one can agree with Professor S. E. Zhilinskiy, who believes that risk is “an eternal satellite of entrepreneurship, but not necessarily present in every individual entrepreneur’s activities” [2, p. 83].

Thus, it turns out that risk, first, can characterize not only entrepreneurship but also other kinds of social activity. Second, in certain types of EA it can be completely absent. May one consider this characteristic essential? Is there a need to specify the legal definition of EA with “risk” as its specific sign? It seems not. For business, it is a formal and by no means mandatory feature.

The next legal distinction is **systematic basis**. None of Russian lawyers would definitely say what the phrase “to perform EA systematically or to seek for a systematic profit” means. And the point is that the legislator, stipulating the sign, “has forgotten” to specify the criteria (time, field, frequency, number of repetitions, the volume of sales, amount of profits, number of bargains concluded...); thus, again it is anything but an essential characteristic.

The approach to define the essence through the so-called “systematism” seems to be ludicrous. It can be clearly seen if we try using this characteristic when defining some well-known things; one can take any (labor, sport, sex, theft, etc.). For example, infidelity is having a regular (systematic) sex with someone who is not your regular sexual partner; but in terms of the above approach, in case it happens

once a week, it is not infidelity. Or let us take another example which would be closer to civil law. An author is someone who consistently makes some creative products. However, there are authors who created only one thing (e. g. Ogiński composed the only polonaise); are they not authors? So all this looks like a complete nonsense.

Any business can be practiced systematically, professionally or occasionally. This sign has nothing to do with the concept of essence. It can be used to resolve the issues of tax administration, to identify types of legal liability, etc.; but this imaginary specific difference does not provide a better understanding of the concept under study. If to deal with the essence of the concept, rather than solve some additional tasks at the same time, this feature should also be left beyond the legal definition.

To summarize, the systematic base is a formal sign of entrepreneurship just the same way as risk and necessity of legitimation. Legal and illegal, systematic and one-time, risky and risk-free... all these are kinds and forms of EA.

**Independence.** This is another, to put it mildly, not indisputable “invention” of the theory of business law. Where does this feature come from? It is a heritage from the federal legislation of the “Pere-stroika” period. And we continue to use this term mechanically, mindlessly, having completely forgotten about the historical conditions which determined its occurrence. For the first time “independence” appeared in the Law of the RSFSR of December 25, 1990, No. 445-1 “On enterprises and entrepreneurial activity” (Bulletin of the Congress of People’s Deputies of the RSFSR and the Supreme Council of the USSR, 1990, No. 30, p. 418), and four months later was already duplicated in the Law of the USSR dated 02.04.1991 No. 2079-1 “On General principles of entrepreneurship of citizens in the USSR” (Vedomosti of the CPD of the USSR and the USSR Supreme Council, 1991, No. 16, p. 442).

At that time, this sign only referred to individual entrepreneurs (sole proprietors). In the conditions of the total state ownership, when the state was almost the only employer, and one could be imprisoned for parasitism, an individual entrepreneur needed to be given the legal basis to legalize his/her “unemployment” in the process of planned social production. Under these circumstances, the term “independence” has a totally different meaning, which is far from

the modern understanding. A Soviet citizen-entrepreneur was recognized independent in relation to the state and thus was legalized in the legal field.

Modern Russian jurisprudence for some reason has extended the frame of entrepreneurial independence. First, not only citizens but also the rest of EA subjects have suddenly become more “independent”. Secondly, in the current legal doctrine the term “independence” starts to separate entrepreneurs not only from the state but also from all other entities. For example, when speaking about an entrepreneur’s superiority in terms of his/her organizational independence, their legal status is often compared to that of a wage and salary worker, the subject of labor relationship. Is this correct?

Indeed, if we compare the universal legal capacity of commercial organizations with special or limited legal capacity of non-commercial legal persons, the superiority of the former in terms of autonomy is somehow possible to be justified. However, when comparing the degree of independence of an individual entrepreneur (sole proprietor) and that of natural persons, such superiority cannot be found.

As is known, at a certain age we are all equally independent. It is also necessary to remember that an opportunity to perform EA is an element of a civil legal capacity. So can a part exceed the whole? It can be argued that an ordinary capable citizen is more independent. For example, he/she can be hired for a state service, but an entrepreneur cannot.

Now let us consider labor relationship. Superiority of an entrepreneur over an employee in terms of independence is usually presented as follows: an entrepreneur is free to choose a counteracting party, an area for application of his/her abilities, to set working conditions (he/she may not go to work at all). An employee, however, has to obey the rules of the labor routine and can be fired for truancy. And here the question arises whether an employee is not free to choose the profession, company and employer; and is not an entrepreneur going to lose a part of profit, a client, a market share for his/her non-going to work?

The given comparison is at least inappropriate as it is an attempt to compare concepts which are different in their essence. It is something like: is a

metal swing better than a green one? An employee has labor legal capacity while an entrepreneur enjoys civil legal one. And within their legal capacity all the subjects of law are equally independent.

Obviously, an entrepreneur’s independence is illusory and exaggerated. An entrepreneur has to follow the rules of the market society social structure the same way as its any other participant. Taking this fact into account, all kinds of EA can be defined as social and not only that making money through providing social services.

So, is an entrepreneur’s independence advantageous compared to that of other participants of civil circulation under the following conditions: EA is the only possible kind of self-employment; the activity takes place facing serious competition, in a monopolized or undeveloped market; an entrepreneur is an element of a commercial structure; he/she has no access to resources; he/she is in the bankruptcy process? No! All his/her decisions are predetermined and the choice of options is not wide, if any at all. Thus, in terms of independence an entrepreneur has no advantages.

The sign under consideration can serve as the basis for classifying entrepreneurs into types: from owners of means of production with enormous personnel to start-uppers possessing only debts and their own hands to work. However, all these characteristics do not differentiate the types, they are intragroup ones.

It has to be noted that the above mentioned polar opposite types of entrepreneurs actually go beyond the legal definition of EA. The former almost do not conduct real entrepreneurial activity, owning paper holdings, shares, means of production and other property – all these self-working and self-expanding values, or capital according to K. Marx. These people are not entrepreneurs as they are, they should better be named capitalists, investors, rentiers. The latter, occupying the opposite position of this homological line, are very close to another type of social activity, which is labor activity. By the way, earlier in the Soviet legislation there was a more precise definition of this type; it was called “individual labor activity”.

As a result, it turns out that independence is not a specific sign of EA. However, it

is appropriate as an intragroup feature of forms of EA.

The next qualifying feature of EA is its specific purpose, i. e. a **profit**, which, by definition of the Tax Code of the Russian Federation (Article 247), is income minus expenses. How can we evaluate this goal-setting? To start with, here are some general propositions.

First, specifying profit as the only goal of EA, the Russian legislator actually defines an entrepreneur as a subject striving for unequal exchange, any interaction with whom leads all the rest to undisputed economic losses. From this perspective, entrepreneurship is a form of theft, a form of social robbery legalization. The following example illustrates how quickly such a self-seeking and not connected with shared interests goal-setting can cause a subject's social deformation.

The Russian government is responsible for the opportunities for its citizens to enjoy their constitutional rights, including the rights to rest and leisure and the right to healthcare (clause 5, Article 37 and clause 1, Article 41, Constitution of RF). It looks like efforts of the government in this sphere must be pretty obvious. However, once the Russian railways turned into a commercial enterprise, "OAO Rossiyskiye zheleznnye dorogi", fares for the most popular holiday period rose twice and even more. The fact is that now all shares of this organization now belong to the state. And what will happen when they all go private?

Legalizing an entrepreneur as a subject seeking only profit, we ourselves create a situation in which we will always fight against constant growth of the cost of goods, works and services with a simultaneous decrease in their quality.

Listen to the leading representatives of the business community. They, by the way, quite clearly evaluate their social mission precisely following the letter of the Russian law: "The crisis is a good time, there are only effective entrepreneurs left. Honestly speaking, both the developer and the

retailer do one thing: they try to rob the consumer to the greatest possible extent. Maximally" [4, p. 14].

Any normal social community, whether it is a family, work team, sports team, friends..., detecting a "drone", pilferer, idler, thief, drug addict or any other form of parasitic attitude in its ranks, try to "cure" this disease, to get rid of it... And this social algorithm is successfully realized in Russia although the vast majority of population has neither desire nor intention to keep pace with annual unreasonably rising tariffs, fares, food prices and cost of public utilities. It is rather difficult to explain why the Russian legislator authorizes such businesses. It has to be noted that irrespective of oil price changes at external markets petrol prices in Russia keep growing. And there is no wonder as in our economic model there is no dependency between these rates. If there is the only goal – a profit, then everything happening is just the way of gaining it.

Taking all the above into account, let us introduce another term into the definition under consideration; this term is "income", which would make entrepreneurial goal-setting not so narrow or socially dangerous.

Second, any system goes through one of the three stages: development, equilibrium, decay. Being a variant of non-equivalent exchange, profit can serve as a feature of business only during the period of its growth, for instance, as an element of extended reproduction when markets are developing. In other cases, such goal-setting is totally unreasonable. It can be clearly seen from the examples of biological systems. A cell of a living organism as a constituent of a system is unselfish. As soon as due to some reasons it switches to a selfish mechanism of non-equivalent exchange, a disease starts. For example, carcinoma is a group of such selfish cells.

Third, turning to law, one should note that foreign legislations, serving as models for modern

Russian lawmakers, do not use such goal-setting. For example, in the USA business entities do not include any “profit corporations”, but there is a “business corporation” along with “public”, “quasi-public”, and “nonprofit corporation”. It is clear that the term “business” (occupation, profession, firm, etc.) cannot be narrowed down to the uncontrollable pursuit of profits, typical of Russia.

The same can be observed in the continental law system. For example, in Germany according to § 14 of the Civil Code, an entrepreneur is either an individual or an entity that makes a deal performing either business or independent professional activity [1, p. 2]. And there is no any mention of profit or something like that either.

It should also be noted that the above German definition taken from a source translated into Russian cannot be considered adequate. It causes a dilemma: either the German legislator made a logical mistake giving a definition through a word with the same root, thus defining the unknown through the unknown (an entrepreneur is the one who performs entrepreneurial activity) or the Russian translation is inadequate.

If we look into the German source, we will see that the latter assumption appears to be correct. The German legislator did not make any mistakes and used different terms (Unternehmer and gewerblichen). According to German-Russian dictionaries, the adjective *Gewerblichen* is translated as commercial, trade, industrial, etc. And again no mention of profit being the only and the most important goal of EA is found.

By the way, the same complaint can be made about the accuracy of translation of the definition of the term “trader” in § 1 of the German Commercial Code [12, p. 7]. A trader (*Istkaufmann*) is the one who is engaged in commercial (*handelsgewerbe*) activity. And then, any activity (*Gewerbebetrieb*) can be treated as commercial (*Handelsgewerbe*). Thus, Russian translation distorts the content of German legal definitions.

Fourth, plenty of suggestions have been made in Russian legal literature concerning introducing the definitions of social, ecological, responsible and

other kinds of entrepreneurial activity into texts of federal laws. If it is done, the existing legal definition of EA will be made more complicated through introducing additional goal-setting. It seems that there is no need in it.

Business profit itself is not actually be a goal; it is a mean for achieving numerous goals implied within the entrepreneurial activity. The state, when developing and supporting entrepreneurial activity, fights poverty, unemployment, expands goods markets, fills budgets, etc. Private actors are concerned about their own interests. Small talks with entrepreneurs will make it clear that they do it for different reasons: for the sake of social status, because of despair, dedication, interest in work, because they want to help their relatives raise children and give them good education, etc. Business profit allows them to solve all these problems.

Where the profit obtained from entrepreneurial activity should go is the sphere of public/private option. Profit can be spent on household, family needs, a car, a yacht, charity, ecological problems solution, etc. There is no need for all these to be embraced within the legal definition. Entrepreneurial activity is fee-based. This is enough. And if required, all the goals mentioned above can be seen in terms of business profit.

Despite the comments and criticism, the term “profit” is the first really qualifying characteristic of EA as distinct from all previously considered. This goal is tangible and it allows for distinguishing EA not only from other intangible and non-commercial activities but from other types of economic (material) activity. For example, we can correlate EA with economic activity, comparing two distinct legal categories of “profit” and “income”.

The final of the essential features, a **method of making a profit**, is the most criticized one. In business law science, it is believed that there is no need to limit the ways to profit by their specification. This practice is totally confused and often simply ignores it. And this is unacceptable because, unlike independence, risk and consistency, a “method of making a profit” is an effective and a really working sign. At least it will help,

similarly to the criterion of “profit”, to distinguish EA from “other economic activities”. How in particular is it possible?

For the sign to work, we need to have a look at the Tax Code of the Russian Federation. Sale of goods, works, services and property rights are taxable “sales operations” (Article 249). In the above case, the provisions of the Civil Code and the Tax Code are clearly linked in contrast to other normative legal acts regulating EA in Russia. For example, the “rich” conceptual framework of the Federal Law of 24.07.2007 No. 209-FZ “About development of small and medium enterprises in the Russian Federation” (Parlamentskaya Gazeta, No. 99-101, 09.08.2007) does not correlate effectively with other normative legal acts.

The considered sign is really important. In case there was no this feature, the current legal definition of EA would cover whatever one likes, including various types of theft. Thieves’ activity is an independent one, risky and aimed at systematic obtaining of a profit. As you can see, all the features fit.

As for the comments on the fact that this legislative provision is “incomplete and inadequate to reflect the real ways of gaining a profit”, and “...the claims of the legislator ... to give an exhaustive list of ways you can make a profit, are doomed to fail” [2, p. 85], it is necessary to say the following.

What are “realizable” and “non-realizable” transactions? It is the result of dichotomous division. As is known, dichotomy in formal logic is “division of a concept into two classes, covering the entire scope of the divisible concept” [10, p. 24]. Therefore, there are no other ways of making a profit; these two classes cover the entire scope completely!

How do these two classes differ? Realizable transactions are dynamic actions. Entrepreneurial activity is a subject’s active behavior. On the contrary, non-realizable transactions are passive. The Russian Tax Code enlists profits gained through these operations (Art. 250). These are profits from:

- share holding;
- positive (negative) currency translation difference;
- letting property, etc.

Subjects gaining a profit from non-realizable operations are not entrepreneurs. They are capital-

ists, rentiers, share-holders, etc. Rentiers are passive as they have no products of their entrepreneurial activity. What works for them is their capital and someone else’s embodied labor.

As a matter of fact, from this perspective a bank is seen as a commercial but not a business structure. According to Russian law, an entrepreneur and a trader are not synonyms, as well as in many foreign legislations. In Germany, for instance, an entrepreneur is a subject of the Civil Code whereas a trader is the one of the Commercial Code. The term “commercial activity” in Russian law is broader than the concept of entrepreneurial activity. Investors, rentiers, founders of business structures fall into the category of traders. All of them are traders if judged by the current Russian legislation (Art. 50, the Civil Code of RF) treated literally. They are traders but not entrepreneurs. Not all traders are entrepreneurs but all entrepreneurs are traders. This is the only conclusion that can be drawn from Article 50 of the Civil Code of RF.

Russian legal literature contains some opinions that commercial activity is an equivalent of entrepreneurial activity or even narrower in its meaning; as a rule, these opinions are based on linguistic techniques. For example, Professor B. I. Puginsky, using literal translation of the Latin word “Commercium” (trade), introduced commercial law, thus defining the whole sub-branch. Trading activity is treated as the synonym of commercial activity and in these terms the scholar’s opinion that “business is far broader than commerce” [8, p. 10] is justified. This approach is not directly related to the legal content of the Russian concept “commercial” since according to Article 50 of the Civil Code of RF the content of the term “commerce” is completely different.

Thus, what is entrepreneurial activity? It seems to be a kind of economic activity aimed at making a profit through realization of goods and services as well as property rights (in terms of the Tax Code of RF). What is this activity like? And how can one differentiate it from trade, construction, fishing and so on?

If we turn to the Russian Classification of Economic Activities (OKVED) of 2015 (as amended by No. 2/2011 OKVED, approved by the Order of Rosstandart of June, 17, 2011

No. 134-st., No. 3/2011 OKVED approved by the Order of Rosstandart of December 14, 2011, No. 1517-st.), we will not find entrepreneurial activity there. The above classification contains everything from trade and construction to veterinary help and waste discharge. Everything except entrepreneurial activity!

Chapter 91.11 of the above mentioned classification “Activity of Commercial, Entrepreneurial and Professional Organizations” states that this group includes “activity of organizations whose members’ interests are focused on providing development and prosperity of enterprises within a certain area, for example, trade, agriculture and so on”.

Thus, the classification divides all kinds of activities into abstract (EA, commerce and professional activity) and those of a “particular area of activity” (construction, trade, etc.). Without taking into account advantages and disadvantages of this classification, let us ask a question: can “particular” types of activity be converted into entrepreneurial activity? Yes, of course, as soon as a particular type starts returning a profit. It means that construction, trade, fishing should be not only carried out on a paid basis (this can be performed by non-commercial subjects too) but also aimed at nonequivalent exchange, i.e. should try to get compensation exceeding the expenses involved by any means.

Therefore, any activity in Germany can be classified as entrepreneurial activity as well as commercial. Thus, generally speaking there is no entrepreneurial activity as it is; there are particular types of economic activity carried out on commercial basis. And entrepreneurial activity is not an activity itself but its kind.

Commercialization, entering the market, converting someone else’s non-business results of “particular” types of activity into goods, works, services, etc. in order to sell them at a price exceeding the expenses involved – this is what can be called “pure” entrepreneurial activity. If an entrepreneur is himself/herself engaged in building, fishing, growing something and so on, it is a hybrid form of economic behavior.

### **Issues of Law Enforcement Practice**

As you can see, the legal construction laid down by the legislator, is complicated, ambiguous to understand and raises many questions even with theorists within the field. By and large, it is completely impossible to use it. In practice of law enforcement the situation is even worse. See, for example, the cassation definition of the Judicial Board on criminal cases of the Perm regional court in case No. 22-1290/2013 dated March 5, 2013 [5, p. 10].

Russian courts with no hesitation bring natural persons who get income from non-realizable transactions to trial for illegal entrepreneurship, according to Article 171 of the Criminal Code.

This practice is ludicrous both in terms of Russian civil law theory and tax law. A natural person being a taxpayer pays out into the state budget (PIT rate is 13 %) more than twice as much as subjects of entrepreneurial activity practicing simplified taxation system (one of the rates is 6 %). Thus, when commercial and entrepreneurial activities (realizable and non-realizable transactions) are treated as equal it looks like our law enforcement authorities punish people by making them pay higher taxes. And one can only wonder what danger to the public these people’s activities contain in Themis’ opinion.

Unfortunately, we do not have any other judges. Who we should complain about the current law enforcement practice is the Russian legislator, providing society with ambiguous, complicated laws confusing even professional lawyers.

We can only agree with our colleagues from Saint Petersburg State University, who note in their research that “texts of normative acts are written in a difficult scientific language, and to comprehend them you need not only to have a degree but also to be prepared to the fact the reading is not going to be easy” [4, p. 14].

Now, after content of all the signs has been analyzed, it is possible to derive the definition of entrepreneurial activity. It will look as follows:

entrepreneurial activity is realization of goods, works, services and property rights carried out on commercial basis. It can also be defined as a type of commercial activity carried out through realization of goods, works, services and property rights. This is the actual legal content of the statutory definition of entrepreneurial activity in Russia.

### Conclusions

1. Four of the six legal signs of EA provided for in Article 2 of the Civil Code are formal: independence, risk, systematic basis and the necessity of the state registration. In terms of determining the nature of EA, they are useless.

2. There are only two really “working” essential differentiating features in the legal definition of EA in Russia: the purpose of the activity (profit) and the ways to achieve it (from using property, sales of goods...). All the others can be neglected with no harm to the definition.

3. Profit, as the only legal goal of EA, is deconstructive and generates fatal social contradictions. This goal should be replaced in definition, for example, with a more neutral term “income”.

4. Commercial activity is a set of active and passive ways of making a profit (from realizable and non-realizable transactions). It is the closest concept in relation to EA. The concept of commercial activity is broader than the concept of EA.

5. Entrepreneurship in Russia is any economic activity performed on a commercial basis in the form of sale of goods, works, services and property rights.

6. Terminological ambiguity of basic concepts of the legal mechanism decreases the efficiency of statutory regulation and discourage subjects of civil law relations from proper performance of obligations.

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