UDC 347.2:339.524.4
DOI: 10.32518/sals3.2023.129

Соціально-правові студії. 2023. Т. 6, № 3
Social & Legal Studios. 2023. Vol. 6, No. 3

Regarding the issue of special import of goods for military purpose and dual use as items seized or restricted in civilian circulation

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Abstract. The relevance of the study is stipulated by the urgent need to urgently fill the suddenly emerging legal gaps caused by the expansion of the powers of non-governmental organizations that have been actively involved in the process of assisting combatants. The study aims to solve an important pragmatic problem: to ensure legal harmonization of procurement with the highest productivity and lowest legal and financial risks. The study uses a synthesis of general scientific, legal and sociological-legal approaches, methods, and techniques of scientific knowledge. As a result of the work carried out, the author managed to rethink the legal status of things as objects of civil rights in the light of the latest military realities. The legal algorithm of procurement of military and dual-use goods by non-governmental organizations is clarified; a parallel is drawn with the procurement procedure carried out by the relevant state-owned enterprises. The author comprehends the phenomenon of a trade mission in general and a trade mission burdened with a foreign element in the field of foreign economic activity in particular. The author analyses the conflict of laws clauses which can resolve the contradictions of counterparties in an international sale and purchase agreement. The author suggests ways for further scientific research in this area of research. The author structures the mechanism by which representatives of the public sector, including charitable organizations and foundations, may obtain licences for the purchase of military and dual-use goods for the army. It is argued that in practice, since the beginning of hostilities, these organizations, and foundations have been creating a worthy alternative to the State defence sector. These developments, in addition to their pragmatic significance, are also characterized by a certain theoretical significance, since they can be used for scientific research and solving problems in the field of property rights, the law of non-governmental organizations, foreign economic activity, as well as for developing and improving training courses in the field of civil, humanitarian and international law

Keywords: import; objects of civil rights; turnover capacity; non-governmental organizations; trade representative office

Introduction

In the context of the armed conflict in Ukraine, various non-governmental organizations are actively involved in helping the military, including procurement of certain goods needed at the front. However, in practice, this activity often finds itself in a conflict between efficiency, on the one hand, and legal and financial risks, on the other. Therefore, the issue of legal aspects of special imports has become particularly relevant. Modern developments in the field of scientific research on the legal nature of things in general, as well as in the context of their turnover and the specifics of foreign economic activity, within which the latter are the subject, are contained in the work of A. Slipchenko (2017). Scientific attention is focused on the legal concept of turnover. Tendentiously, the works of V. Pohrebniak (2020) and O. Pervomaiskyi (2021) highlight the thesis of the need to understand the doctrinal and conceptual foundations of negotiability as a civil law phenomenon, the fact of negotiability of objects, and the negotiability of subjective civil rights to them, in particular, their "alienability". The aforementioned researchers used a deductive approach to analysing the problem, which allowed them to comprehend the fullness of the legal reality in the area of limited negotiability, which is possible only after understanding the dictum of this category and further

Suggested Citation **Article's History**: Received: 13.06.2023 Revised: 22.08.2023 Accepted: 27.09.2023

Petronchak, Yu., & Romaniv, K. (2023). Regarding the issue of special import of goods for military purpose and dual use as items seized or restricted in civilian circulation. *Social & Legal Studios*, 6(3), 129-135. doi: 10.32518/sals3.2023.129.

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analysis of sectoral aspects: the legal fate of mutually corresponding civil rights related to a thing.

The second group of scholars whose research is directly related to limited turnover or things withdrawn from civil circulation points to the need to create a single regulatory act containing an exclusive list and a clear legal algorithm for interaction with things with the outlined specifics (Kravtsiv, 2019), or even more – a clear list of bodies that will determine the limited nature of things in civil circulation (Shlyahovska, 2022).

The third aspect of the issue raised – the movement of such goods across the customs border, which is mainly implemented on the basis of sales and supply agreements and contracts of carriage – is studied both within the framework of civil law in general and private international law in particular. I. Oleksyn and T. Kysil (2019) emphasize the complexity of the international sale and purchase procedure, differences in the counterparties' approaches to the interpretation of the provisions of the Vienna United Nations Convention on Contracts for the International Sale of Goods (1980) and the Principles of International Commercial Contracts (UNIDROIT, 1994), and the desire to maximize the fixation of all contractual provisions, which, however, is not able to fully resolve the problems as international commercial arbitration can. Particular attention of researchers, which is acutely relevant in the context of procurement of goods for the army, is paid to the supply of goods by road in the form of a legal category of cargo, the legal features of such procurement on the basis of an international contract of carriage (Yanovytska, 2019).

Despite significant developments in the legal regulation of civil rights objects and their marketability, scientific developments can be considered very moderate, if not insufficient. There are several reasons for this state of affairs. Firstly, a significant part of the goods purchased for transfer to combat zones are military and dual-use goods. Depending on the type, they are withdrawn or restricted from civilian circulation, and activities related to their acquisition require a certain entity or certain licences. Secondly, the purchase of goods from abroad, i.e. movable property as an object of civil rights, is a relationship with a foreign element, as the property itself is located in the jurisdiction of another state, and one of the counterparties to such an agreement is a citizen or resident of that state. The delivery of such goods takes place exclusively by crossing the customs border of Ukraine, and therefore this type of activity falls under the definition of foreign economic activity with all the relevant legal conditions and consequences. These legal gaps should be filled in order to solve a very practical and urgent task – competent legalization of volunteer labour, which has long been legitimized by society, increasing legal guarantees for the activities of public and charitable organizations, and harmonizing these relations. Given the relative novelty of this social phenomenon, there has been no scientific understanding of the procurement of military and dual-use goods before. Although it is not easy to conduct such research, the acute urgency of the issue directly indicates its necessity.

The purpose of the study is to provide a detailed analysis of the legal aspects of procurement of military and dual-use goods. To achieve this goal, general scientific approaches (analysis and synthesis, induction and deduction), special legal approaches (methods of legal technique), as well as sociological approaches, methods, and techniques of scientific knowledge of interdisciplinary research were used. Among the latter, the material necessary to ensure the representativeness of the study was collected through sociological observation, content analysis and generalization.

With regard to the analysis of the legal framework for the issue of turnover of military and dual-use items and goods, the special and technical legal methods of studying legal acts made it possible to determine the specifics of the legal status of the subject and object composition – non-governmental organizations and items as objects of civil rights. The objects of the study were the Law of Ukraine "On State Control over International Transfers of Military and Dual-Use Goods" (2003), Order of the State Service of Export Control of Ukraine "On the Approval of the Instructions on the Procedure for Filling out Applications for Obtaining Permit Documents, Guarantee Documents and Other Documents Provided by the State Export Control" (2004); Resolution of the Cabinet of Ministers of Ukraine "On Approval of the Procedure for State Control of International Transfers of Military Goods" (2003), Resolution of the Cabinet of Ministers of Ukraine "On Approval of the Procedure for State Control over International Transfers of Dual-Use Goods" (2004), etc. The general scientific methods of induction and deduction, analysis and synthesis, and abstraction and concretization were used continuously to understand and structure the material collected for the study in the course of working with foreign and Ukrainian scientific and journalistic sources.

To the question of the dynamics of the modern doctrine of the turnover capacity of things as a category of civility

The classification of things – objects of the material world endowed with certain generic characteristics on the basis of their negotiability – was initiated in the period of Ancient Rome. As noted by V. Skrypnyk (2018), the lawyers of Ancient Rome distinguished between the so-called "things in property", "things outside property" and "things withdrawn from civil circulation". The legislator made a quite substantive and specifically defined division of things depending on the degree of their turnover capacity in the Civil Code of Galicia of 1797 (von Martini, 2017). It was proposed to divide things into those belonging to citizens, associations, and the state. The latter included things that belonged to the state as a whole or to its individual citizens, i.e., intended for common, public use, as well as those that serve to meet state needs, such as coinage, mineral deposits, mines and deposits, etc. The Roman tradition and the Austro-Hungarian legal heritage have influenced the branches of private law today. According to Article 178 of the Civil Code of Ukraine (2003), "objects of civil rights are characterized by free alienation and transfer of ownership from one person to another by way of succession, inheritance or otherwise, unless they are withdrawn from civil circulation, or are restricted in civil circulation, or are not inalienable from the subjects of law. The list of things – objects that may be owned by exclusive subjects, or the list of things that may be owned only by special subjects, shall be established by law on the basis of a relevant permit."

The question whetherit is appropriate to talk about restrictions on civil law in a one-dimensional aspect or whether the restricted circulation of objects is divided into certain subtypes is still open. After all, certain objects from the list of restricted objects may be acquired by general subjects to

certain permits (e.g., weapons), while others (e.g., architectural monuments) do not have this property and are restricted in civil circulation due to the peculiarities of their legal nature. In addition, the effect of special legal regimes in a state (the war in Ukraine is a case in point) or on its separate territory may give rise to a change in the definition of the limits of turnover of certain types of things.

The turnover of things should be considered in two aspects: static and dynamic. It is advisable to analyse the turnover of things in a dynamic manner, based on their characteristics and, therefore, their legal nature: things that, by their functional purpose, cannot be acquired by a general subject of law, or such acquisition would be contrary to common sense and impede the progressive development of society, can be classified as excluded from civil turnover.

The other category is the category of limited turnover, and the list of things that fall into this category is more numerous and de facto covers two subtypes: things that become the property of a person registered in accordance with the law – a special entity – on the basis of possession of a licensing permit, and things that are acquired by a general entity on the basis of special permits. The former are absolutely restricted, while the latter are relatively or quasi-restricted. Therefore, things acquired by a special entity are absolutely restricted, while things that require a special permit or a certain algorithm to be acquired by a general entity should be considered quasi-restricted.

The Resolution of the Verkhovna Rada of Ukraine "On the Ownership of Certain Types of Property" (1992) outlines the boundaries of objects excluded from civilian circulation, as well as those that are limited in their turnover. These include, in particular: weapons, ammunition, military and special military equipment, rocket, and space systems; special technical means of covert information acquisition.

Based on the provisions of this legal act, for example, the purchase of popular unmanned aerial vehicles as aerial reconnaissance objects is completely prohibited. Such an item is de jure excluded from it, but de facto it is limited in its turnover, as public and charitable organizations manage to carry out such procurement activities on a completely legal basis.

As mentioned above, the turnover rate should be considered especially carefully in the dynamics. Changes in the legal regime in a country can quite easily "shift" certain items to a whole category of turnover, make seized items restricted, and classify restricted items as quasi-restricted, or even jump through one conditional grading category. At the same time, the civil law doctrine of negotiability, like many other doctrines and concepts, needs to be rethought in the light of recent political and legal developments.

Legal features of acquisition and alienation of goods of military purpose and dual use

The Law of Ukraine "On State Control over International Transfers of Military and Dual-Use Goods" (2003) is the legal act that reveals the detailed content of the basic operational terms of the study. Namely: "military goods are: military articles – weapons, ammunition, military and special equipment, special components for their production, explosives, as well as materials and equipment specially designed for the development, production, or use of these articles; dual-use goods are "certain types of articles, equipment, materials, software, and technologies not specifically intended for military use, as well as works and services related to them, which, except for civilian use, are not used for military purposes". As it follows from the above, when it comes to military and dual-use goods, it is most often products that are meant, but the two auxiliary subtypes: services and technology, can be assumed to be a kind of accompanying special imports.

It can be argued that the procurement of military and dual-use goods by civic and charitable organizations is an unprecedented phenomenon caused by military realities. This state of affairs has somewhat shaken the established legal dogmas about the marketability of things, given the actual transfer of military weapons and equipment from the category of items withdrawn from civilian circulation to the category of restricted items.

Since the spring of 2022, one of the charitable foundations, which is a type of charitable and therefore non-governmental organization (NGO), has managed to obtain permission to purchase military and dual-use goods. The pioneer in this area was the CO "Come Back Alive" (Official website of the foundation…, n.d.). This example was soon followed by other civic and charitable organizations, including the Poroshenko Foundation and the non-profit organization World Congress of Ukrainians (Rzheutska, 2022; Ukrainian arms dealers unveil…, 2023).

In particular, over the last ten months since the publication of the data on obtaining a licence for the purchase of military and dual-use goods, the CO "Come Back Alive" managed to purchase and transfer to the end user a Bayraktar TB2 strike UAV system consisting of three drones, a ground station, guided munitions and other equipment, 65 reconnaissance complexes, 11 special armoured vehicles, 1460 7.62-mm machine guns, about 7,000 TV and night optics, rangefinders, rifles, magazines, horns, ammunition, etc. (Official website of the foundation…, n. d.). This state of affairs was made possible by the fact that in Ukraine, despite the classification of certain property rights objects as those withdrawn from civilian circulation, there is no exhaustive list of entities authorized to specially export (import) them. This was the reason for the lawyers of the said CO to collect the necessary documents and submit them for registration as a special import entity.

As noted by L. Rzheutska (2022), "the purchase requires demonstration of the end-user certificate to the manufacturer, while the regulatory authorities (the State Export Control Service of Ukraine – SECU) carry out currency controls and financial monitoring". Therefore, Ukrainian legislation authorizes a special body that will control export-import operations to monitor the categories of goods that: can be used in the manufacture of nuclear weapons; can be used in the manufacture of chemical, biological (bacteriological), toxicological weapons; elements of rocketry, resources, equipment and technical equipment, including modified and improved ones that can be used in rocketry, as well as military and dual-use goods.

Legal entities that are business entities or individual entrepreneurs that intend to engage in international transfers of military or dual-use goods may obtain a licence, which, depending on the duration and scope of the powers corresponding to its holder, is divided into a general, open or one-time licence. The list of necessary documents to ensure such a right is contained in the Order of the State Service of Export Control of Ukraine "On the Approval of the Instructions on the Procedure for Filling out Applications for

Obtaining Permit Documents, Guarantee Documents and Other Documents Provided by the State Export Control" (2004).

An interesting aspect of actual procurement is the need to have an end-user certificate, a document that essentially indicates the de facto transit activity of a public or charitable organization as a transporter or forwarder. And, as practice shows, the task of delivering the purchased equipment is no easier than the purchase itself. According to B. Miroshnychenko (2023), "charitable foundations do not have the same logistical capacity as NATO or the Ministry of Defence, so they have to pave their own way. A significant number of armoured vehicles, which are freely purchased from the UK, which is reducing its army and selling off armoured vehicles after the withdrawal from Iraq and Afghanistan, were transported by ferry to the Netherlands and then transported across Europe to Warsaw. There, the armoured vehicles were transferred by cranes to trucks of Ukrainian carriers, which delivered them to brigade commanders". It is not only the tracking itself that causes difficulties, but also the means of its implementation. Purchased armoured vehicles are usually transported by trucks, trawls, tents after obtaining the relevant export permits in the seller's country, as well as licences to cross the territories of transit countries, the duration of which varies from several days to weeks, depending on the workload of the relevant ministry in a particular country.

According to A. Potichnyi, Director of the United for Ukraine Initiative of the Ukrainian World Congress, "there are statistics that show that volunteer organizations have managed to purchase more than 160 units of armoured vehicles at the expense of Ukrainian and foreign sponsors. The leading ones are the Spartan, a seven-seater armoured personnel carrier suitable for transporting small reconnaissance groups, and the FV434, an armoured repair vehicle with a crane for work in the field. The FV105 Sultan is a headquarters armoured personnel carrier with a relatively comfortable working space" (Ukrainian arms dealers unveil…, 2023). Therefore, it can be concluded that volunteer organizations can be quite effective in supplying weapons and other goods needed by the military to the frontline. This is of great importance, especially when it comes to the prompt implementation of important special procurement.

Commercial mediation in the defence sphere and conflicting ties of foreign economic activity

It is not only non-governmental organizations, such as civic and charitable organizations, that purchase military goods. It is quite natural that it continues to be carried out by representatives of the Ministry of Defence of Ukraine, the Armed Forces of Ukraine and the Defence Intelligence of Ukraine through intermediary companies. Such procurement seems to be more traditional and the procedure is long-established, but at the same time more cumbersome, as state bodies are more limited in their scope of activity and more formally dependent than NGOs.

This practice is based on international sources. As noted by M. Irfan *et al.* (2023), "the defence industry (also called the military industry) consists of government agencies and other business entities involved in the research and development, production, procurement, and service of armaments and military equipment. Although the creation of a defence industry in most countries is based on political and national strategic motives, governments are interested in their strategic development and may involve other actors in the defence sector, especially in developing countries".

Thus, in the broadest sense, a trade intermediary relationship is a type of the latter, where, in the broadest sense, a trade intermediary relationship is a legal relationship where one of the parties (a trade intermediary), on its own behalf, performs certain legally significant actions in the interests of the party provided for in the contract (i.e. the customer), in order to bring about certain desired consequences of a factual or legal nature for the said party (customer). To use a narrower definition, a trade intermediary legal relationship is one in which one of the parties, which must be a business entity (trade intermediary), systematically, for a fee and in person, on the basis of a contract and the powers granted on its basis Actually or legally acts in the interests of the customer in the field of business, at his expense, although on his own behalf, providing the customer with the greatest actual and/or legal assistance in building business relations with other persons (Reznikova, 2013).

According to A. Melnyk and A. Popovichenko (2016), "the complexity of trade intermediary legal relations is due to their special subject composition. An intermediary agreement is a means, a legal structure that legally reflects the essence of trade and representative relations. There are different points of view as to what kind of legal relationship, i.e. between which specific subjects, is a legal relationship of agency. Mediation itself is necessarily expressed in a certain legal structure, i.e. a contract. This structure is sometimes divided into two subsystems: internal and external. The internal one is the very essence of the relationship between the customer and the intermediary, and the external one is the legal relationship between the intermediary and third parties with whom the intermediary enters into in the course of fulfilling the terms of the intermediary agreement in order to perform it". "The implementation of internal and external legal relations is ultimately expressed in the establishment of an economic relationship between the customer and third parties. Thus, third parties also fall under the subjective composition of mediation" (Dunska, 2012). Such statements give grounds to insist that the aforementioned internal part of the commodity intermediary relationship between the intermediary company and the end consumer is a principal-agent relationship, the legal formula of which coincides with the agency agreement. The principal outlines the general features of the subject of the contract, while the agent formulates a protocol of intent or a preliminary sales contract, agrees on essential terms, etc.

The external legal relationship of an agent or sales representative is manifested in its legal relations with the manufacturer, seller, as well as third parties that are a foreign element (subject) regarding the acquisition of ownership of a foreign element (object) (Gramatskiy, 2019). After all, legal analysis of transactions involving legal entities with a foreign element is complex not only in terms of disclosing theoretical and practical issues, but above all, it has difficulties and some peculiarities in the application of foreign law (Samsin *et al.*, 2021). As is the case in a similar situation, when representatives of different legal systems are involved in legal relations, there is an increased risk of legal conflicts caused by differences in legal understanding. A traditional mistake in such a situation, which may not be in favour of the Ukrainian party, is the widespread practice of applying the conflict of laws principle of *lex rei sitae* to resolve legal

disputes, and thus resolving the dispute under the law of the seller's country.

This practice is not legally correct, since the principle of the place of location of the thing *lex rei sitae* is not universal in nature and is unconditionally applied only to immovable things (Shupinska, 2016). The same view is shared by P. Mudgal (2020), who, along with the principle of *lex rei sitae*, distinguishes the "useful" principle of *lex situs*, or the location of assets, in the context of legal discussions on the acquisition of a foreign element (object), and since the funds of the customer – the Ukrainian party is nothing more than an asset, the resolution of such a dispute is likely to take place under the law of the customer's country.

In addition, when it comes to a thing in transit, its legal status may be determined by the law of the country of its departure and the law of the country where the thing is going and is to be received – the law of the country of departure and the law of the country of receipt, respectively, unless otherwise provided by law or contract (Vorobiyenko, 2021). The choice of jurisdiction for its legal qualification or resolution of a legal dispute is based on the location of the thing at the time of the occurrence of a legal fact: an event or action of significant legal significance.

Therefore, a rational decision in the context of choosing the jurisdiction of a thing is to turn to specialists in the relevant field (private international law and/or foreign economic activity) who, based on practical experience, rather than the provisions of theoretical doctrines, would be able to resolve the outlined legal conflicts.

Conclusions

The purchase of goods for military purpose and dual use – an activity that was traditionally carried out by special state enterprises on the basis of trade and intermediary relations between the principality and the agency, has ceased to be a monopoly over the last year. This state of affairs led to the emergence of a number of unsolved problems, the legal aspects of which were the purpose of the study.

Having analysed the new trends in the legal nature of military and dual-use goods, the author concludes that a new legal phenomenon has emerged in Ukrainian civilization – the transition of an item which is absolutely restricted in its circulation to the category of quasi-restricted items. The special importers considered in the study – charitable and volunteer organizations – actively purchase and import weapons on the basis of a general, open or one-time licence, provided that they have an end-user certificate upon prior request to the State Export Control Service. The scientific novelty of the article lies in the presentation of the legal algorithm for acquiring ownership of military and dual-use goods on the basis of a relevant licence. Obtaining such a licence or certificate, as well as the procurement algorithm itself, are complex legal procedures, the legal regulation mechanism, structure, and stages of which are covered in our work, which is relatively new and insufficiently covered in legal science.

When it comes to the involvement of a foreign element in the above relations, the situation becomes more complicated, sometimes resulting in legal conflicts due to the clash of legal systems of different states. The choice of jurisdiction is based on the conflict-of-laws principle of the law of the place of departure or place of receipt of the thing depending on its current location (*lex rei sitae*) or the law of the location of the assets (*lex situs*). The latter principle plays a positive role for the Ukrainian customer, as assets (funds for the purchase of the order) are the prerogative of the Ukrainian party.

Despite the legal complexity, the legislator, having established clear requirements, leaves the list of entities (individuals and legal entities) that can become special importers open. The focus on this result of the study not only highlights its purpose, but also opens up prospects for NGOs and charities inexperienced in this cluster of activities, allowing them to join the process of procurement of military or dual-use goods without the need to engage in principal-agent intermediary relations, and for those who carry out such activities without appropriate permits to start doing so in the legal field.

At the same time, it should be noted that legal regulation of international sales contracts is carried out not only on the basis of the conflict of laws (*lex rei sitae* and *lex situs*) mentioned in this study, but also on the basis of other conflict of laws in the field of regulation of relations burdened with a foreign element. An analysis of the content of the latter in terms of acquisition of ownership of military and dual-use goods by moving them across the customs border could be a promising vector of scientific research.

Acknowledgements

There are none.

Conflict of interest

None.

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До питання про спецімпорт товарів військового призначення та подвійного використання як речей, що вилучені або обмежені в цивільному обороті

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Анотація. Актуальність дослідження зумовлено потребою нагального заповнення раптово виниклих правових прогалин, що зумовлені розширенням повноважень неурядових організацій, які активно включилися в процес допомоги комбатантам. Дослідження має на меті вирішити важливу праксеологічну проблему: забезпечити юридичну гармонізацію провадження закупівель з найбільшою продуктивністю і найменшими юридичними та фінансовими ризиками. У роботі використано синтез загальнонаукових, власне юридичних та соціологічно-юридичних підходів, методів та прийомів наукового пізнання. За результатами проведеної роботи вдалося переосмислити правовий статус речей як об'єктів цивільних прав у світлі новітніх воєнних реалій. З'ясовано правовий алгоритм закупівель товарів військового призначення та подвійного використання неурядовими; проведено паралель з процедурою закупівель, яку провадять відповідні державні підприємства. Осмислено феномен торговельного представництва загалом та торговельного представництва, що обтяжене іноземним елементом у сфері зовнішньо економічної діяльності зокрема. Проаналізовано колізійні прив'язки, здатні владнати протиріччя контрагентів у договорі міжнародної купівлі-продажу. Запропоновано шляхи для подальших наукових пошуків в окресленій сфері наукового дослідження. Структуровано механізм, за яким представники громадського сектору із числа благодійних організацій та фондів, можуть отримувати ліцензії на закупівлю товарів військового призначення та подвійного використання для війська. Аргументовано, що на практиці з початку воєнних дій ці організації та фонди створюють достойну альтернативу державному оборонному сектору Зазначені напрацювання, окрім власне праксеологічної, характеризуються також певною теоретичною значущістю, адже можуть бути використанні для проведення наукових пошуків і вирішення завдань у сфері інституту права власності, права неурядових організацій, зовнішньоекономічної діяльності, а також розробки та удосконалення навчальних курсів у сфері цивільного, гуманітарного, міжнародного права

Ключові слова: імпорт; об'єкти цивільних прав; оборотоздатність; неурядові організації; торговельне представництво